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No. ____

In The

Supreme Court of the United States

JOEL J. KINLOW and TV-49, INCORPORATED,

Petitioners,

v.

CITY OF MILWAUKEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Were the petitioners deprived of a recognized property interest without due process of law and/or were they denied equal protection of the law by the City of Milwaukee when it denied a building permit to construct a television tower?

2. Do the Opinion of the Circuit Court of Appeals for the Seventh Circuit and the underlying Decision and Order of the United States District Court for the Eastern District of Wisconsin violate established standards for application of Rule 56 of the Federal Rules of Civil Procedure?

3. Have the lower court decisions violated the rights of the petitioners under the Seventh Amendment to the United States Constitution?

LIST OF PARTIES

JOEL J. KINLOW and TV-49, INC. are the Petitioners.

CITY OF MILWAUKEE is the Respondent.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
I. THE WRIT SHOULD BE GRANTED BECAUSE BOTH THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND THE DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN MISTAKENLY RELIED UPON A "TRANSMISSION TOWER POLICY STATEMENT" WHICH, ALTHOUGH IT PREDATED THE PETITIONER'S APPLICATION, AND ORDINANCE ENACTING THE POLICY WAS NOT LEGALLY EFFECTIVE UNTIL AFTER THE APPLICATION.	4
II. THE WRIT SHOULD BE GRANTED BECAUSE REVIEW OF THE ORDER OF THE COURT OF APPEALS PROVIDES AN OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO REDEFINE FOR THE LOWER FEDERAL COURTS THE CONSTITUTIONAL PERIMETERS OF MOTIONS FOR SUMMARY JUDGMENT UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE PARTICULARLY WITH RESPECT TO CIVIL RIGHTS ACTIONS AND THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.	10
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 12

Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) 9

Bernstein v. Universal Pictures, Inc., 79 FRD 59 (1978) 16

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) 12

Essex v. United Parcel Service, Inc., 111 F.3d 1304 (7th Cir. 1997) 10

Jackson v. Marion County, 66 F.3d 151 (7th Cir. 1995) 14

Kobs v. Arrow Service Bureau, Inc., 134 F.3d 893 (7th Cir. 1998) 16

Lecates v. Justice of Peace Court 4 of State of Del., 637 F.2d 898 (3rd Cir. 1980) 16

Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) 8

Matsushita Electric Co. v. Zenith Radio, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) 10, 12

Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989) 13

United States of America v. One 1976 Mercedes Benz 280S, 618 F.2d 453 (7th Cir. 1980) 18

TABLE OF AUTHORITIES – Continued

Page

Wood v. International Brotherhood of Teamsters Chauffeurs, Warehousemen & Helpers of America Local 406, 565 F.Supp. 1011 (W.D. Mich. 1983)..... 18

CONSTITUTIONS

U.S. Const. amend. VII 2, 4, 10, 15, 20

U.S. Const. amend. XIV.....2, 3, 8

STATUTES AND RULE

42 U.S.C. § 1981.....2, 3

42 U.S.C. § 1983.....2, 3

Fed. R. Civ. P. 56 .....10, 20

PETITION FOR WRIT OF CERTIORARI

The petitioners, Joel J. Kinlow and TV-49, Inc., respectfully pray that a writ of certiorari issue to review the Order of the United Court of Appeals for the Seventh Circuit entered in this case on March 16, 2001.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Seventh Circuit dated March 16, 2001 affirmed the Decision and Order of the United States District Court for the Eastern District of Wisconsin dated August 8, 2000. The Order of the United States Court of Appeals for the Seventh Circuit is reprinted at App. 1 to App. 13 of the Appendix to this Petition. The Decision and Order of the District Court is reprinted at App. 14 to App. 25 of the Appendix to this Petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its Order of March 16, 2001 affirming the Decision and Order of the United States District Court for the Eastern District of Wisconsin dated August 8, 2000. The jurisdiction of the United States Supreme Court to review the decision of the United States Court of Appeals for the Seventh Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the Seventh Amendment and the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §§ 1981 and 1983.

STATEMENT OF THE CASE

The petitioner, Joel J. Kinlow, is an African-American and the President and sole shareholder of TV-49, Inc. and was engaged in the business of television transmission with a television station located in Milwaukee County, Wisconsin. The petitioner desired to build a higher tower in the City of Milwaukee and in order to implement the project in 1995 the petitioner approached one Albert Dzierzak, a planning examiner for the City of Milwaukee, Department of Building Inspection, in order to obtain information as to what procedures he should follow in order to obtain the permit to build the new television tower in Milwaukee. Mr. Kinlow was informed by Mr. Dzierzak that he should purchase land in Milwaukee's industrial area, obtain a survey and apply to DBI for the permit to build the tower. Acting in reliance upon the advice the petitioner secured an option to purchase property, had a plan of survey prepared and presented it to the DBI. He was advised that there would be no objection by the City of Milwaukee to construction of a television tower on the land located at 3872 Fratney Street in the City of Milwaukee. Petitioner then purchased the property for Two Hundred and Ten Thousand Dollars ($210,000.00). He obtained soil samples and tower footing plans at the behest of the DBI at a cost of an

additional Ten Thousand Dollars ($10,000.00). He also obtained approvals from the Federal Aviation Administration ("FAA") and the Federal Communications Commission ("FCC"). The cost of obtaining the federal authorizations totaled Ten Thousand Dollars ($10,000.00) in engineering and legal fees. Finally, he presented to Mr. Dzierzak soil and tower footing information as requested in March of 1997. In April the petitioner appeared at the DBI to obtain the permit from the City of Milwaukee. Mr. Dzierzak was out sick and another planning examiner, Mr. David Kakatch, reviewed petitioner's application and refused to grant the building permit on the basis that it would be too close to an adjoining building. An appeal to the Milwaukee Board of Zoning Appeals for a variance was unsuccessful as was a action to review the Board of Zoning Appeals' decision to the Circuit Court of Milwaukee County.

In May, 1999 the petitioner commenced an action in the United States District Court for the Eastern District of Wisconsin alleging violation of 42 U.S.C. §§ 1981, 1983 and the Fourteenth Amendment to the United States Constitution. (App. 26 to App. 31)

After the close of discovery the defendant, City of Milwaukee, moved for summary judgment. The respective parties submitted the appropriate affidavits, proposed findings of fact and briefs and the District Court granted summary judgment by its Decision and Order dated August 8, 2000. (App. 14 to App. 25)

Petitioners filed a timely Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. The parties filed their respective briefs and oral argument

was presented before the panel on March 6, 2001. The Court of Appeals for the Seventh Circuit affirmed the District Court by its Order dated March 16, 2001. (App. 1 to App. 13).

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE BOTH THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND THE DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN MISTAKENLY RELIED UPON A"TRANSMISSION TOWER POLICY STATEMENT" WHICH, ALTHOUGH IT PRE-DATED THE PETITIONER'S APPLICATION, AN ORDINANCE ENACTING THE POLICY WAS NOT LEGALLY EFFECTIVE UNTIL AFTER THE APPLICATION.

> "Ex facto jus oritor (the law arises from the facts) the ancient rule must prevail in order that we may have a system of living law."

Justice Brandeis dissenting in *Adams v. Tanner,* 244 U.S. 590, 600, 61 L.Ed. 1336, 37 S.Ct. 662 (1917) quoted with approval by Justice Stevens in *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 80 L.Ed.2d 502, 104 S.Ct. 1949 at 522 fn. 27 (1984).

The following sections of this Petition will consider the propriety vel non of the Court of Appeals or District Court in considering this issue on a motion for summary judgment and thereby preempting the petitioner's rights under the Seventh Amendment to the

United States Constitution. Of equal importance, the findings made were erroneous and incomplete in a critical way.

The Decision and Order of the District Court stated on the issue as follows:

> "In denying the variance, the Board cited safety concerns and rejected Kinlow's claim of economic hardship as a valid ground for granting the variance. In addition, the Board found that the application was inconsistent with the City's Transmission Tower Policy Statement which had been adopted by the Common Council of the City of Milwaukee on March 21, 1997. This policy, which was meant to be used as a reference tool and guide by the Board of Zoning Appeals and others responsible for making decisions about the placement of transmission towers in Milwaukee, favored curtailing and reducing the number of towers. Applicants for permits were to be encouraged to erect towers to accommodate multiple transmission systems. The Board did not favor Kinlow's proposed tower because it would not have provided service for more than one television station." (App. 16 to App. 17)

The Court of Appeals' Decision stated on the issue as follows:

> "**2. The Transmission Tower Policy Statement**
>
> During his testimony at the hearing, the representative also commented that the proposed tower would not comply with a policy objective, formally passed by the Milwaukee Common Council on March 21, 1997, entitled 'the Transmission Tower Policy Statement.' The 'Transmission Tower Policy Statement' provides

> that the 'policy on the placement of transmission towers can serve as a reference tool and guide for the Board of Zoning Appeals, the City Plan Commission, City Building and zoning staff, and other City bodies and officials responsible for making decisions about the placement of transmission towers in the City of Milwaukee.' Milwaukee Wis., Substitute Resolution Approving a 'Transmission Policy Statement' As Part of the Comprehensive Plan of the City of Milwaukee (March 21, 1997). According to the representative, Mr. Kinlow's tower did not meet the goals of the policy *ordinance* because the tower was not designed to accommodate multiple users, was not aesthetic, and Mr. Kinlow had not proposed to landscape the area surrounding the tower. Furthermore, the representative said, Mr. Kinlow's tower did not comply with the policy goal that broadcast towers should serve the entire Milwaukee metropolitan area, and therefore should not be concentrated in the city." (emphasis supplied) (App. 5)

The fact is the policy statement was not enacted into law as an ordinance until November 1, 1997; some seven to eight months after the petitioner's application was made to the Department of Building Inspection for the City of Milwaukee. See Appendix, App. 66 to App. 96.

The ordinance was introduced on May 13, 1997 with a status "passed" and a statement that "this ordinance becomes effective November 1, 1997." (App. 70) Also see page 16 of File No. 970241 (App. 96) which also states "this ordinance shall be effective November 1, 1997."

And most significantly the Zoning Board of Appeals hearing was held on July 31, 1997 some ninety days

before the ordinance was effective. The Court of Appeals' decision erroneously asserts "according to the representative Mr. Kinlow's tower did not meet the goals of the policy *ordinance* . . . ." (emphasis supplied)

The Board of Zoning Appeals was advised that the petitioners' application was not governed by the ordinance and was exempt because it was made before the effective date of the ordinance. The following are abstracts from the proceedings before the City of Milwaukee Board of Zoning Appeals on July 13, 1997:

> "I should note that earlier this year the City of Milwaukee Common Council passed an ordinance that sets a tower policy. The purpose of the tower policy, it is a part of the City's comprehensive plan, and it is designed to be used as a tool to evaluate tower requests by the City Planning Commission, the Board of zoning Appeals and the Common Council. One of the – Since that time the Common Council has passed some direct zoning ordinances regarding towers. This particular case is exempt from that, although I think, you know, some of the issues addressed by that are important. One of the goals of the tower –
>
> MR. ZETLEY: Why is it exempt from it?
>
> MR. RICHARDSON: This case was filed before the new ordinance took effect.
>
> MR. ZETLEY: Okay." (Transcript of City of Milwaukee Board of Zoning Appeals, July 13, 1997, p. 6, l. 8 to l. 24)
>
> "MR. PLEVA: Counsel, may I ask a question? One of the elements contained in the policy statement and the policy statement was

> rather generic and it was meant to be as a foundation for the passage of specific ordinances. I'm not familiar with what specific ordinances at this time have been passed or whether they have been published as yet, but –
>
> MR. TANGEN: It's going to take effect in November." (Transcript of City of Milwaukee Board of Zoning Appeals, July 13, 1997, p. 19, l. 18 to p. 20, l. 2)

In the context of the grant of summary judgment in a civil rights action where a minority has expended more than a quarter of a million dollars in reliance upon the representations of the duly authorized agents of a municipality, there is an apparent violation of the Fourteenth Amendment to the Constitution of the United States in that petitioners were denied due process and equal protection.

Under the circumstances of the case the petitioners appeared to have a clearly defined property interest in the building permit as analyzed in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982):

> "In any event, the view that Logan's FEPA claim is a constitutionally protected one follows logically from the Court's more recent cases analyzing the nature of a property interest. The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12, 98 S.Ct. 1554, 1561-62, 56 L.Ed.2d 30 (1978); *Goss v. Lopez*, 419 U.S. 565, 573-574, 95 S.Ct. 729, 735-736, 42 L.Ed.2d 725 (1975); *Board of Regents v. Roth*, 408 U.S. 564,

576-578, 92 S.Ct. 2701, 2708-09, 33 L.Ed.2d 548 (1972). Once that characteristic is found, the types of interest protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.' *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646, 69 S.Ct. 1173, 1209, 93 L.Ed. 1556 (1949) (Frankfurter, J., dissenting); *Arnett v. Kennedy*, 416 U.S. 134, 207-208, and n.2, 94 S.Ct. 1633, 1670-1671, and n.2, 40 L.Ed.2d 15 (1974) (MARSHALL, J., dissenting); *Board of Regents v. Roth*, 408 U.S., at 571-572, 576-577, 92 S.Ct., at 2705-2706, 2708-2709. See, *e.g.*, *Barry v. Barchi*, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979) (horse trainer's license protected); *Memphis Light, Gas & Water Div. v. Craft, supra* (utility service); *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (disability benefits); *Goss v. Lopez, supra* (high school education); *Connell v. Higginbotham*, 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971) (government employment); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) (driver's license); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (welfare benefits)." *Logan v. Zimmerman Brush Co.*, 455 U.S. at 430-31.

With respect to equal protection *Arlington Heights v. Metropolitan Housing Development Corporation.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) appears to be directly in point. These claims should have been presented to the jury, not denied by the court by summary judgment.

II. THE WRIT SHOULD BE GRANTED BECAUSE REVIEW OF THE ORDER OF THE COURT OF APPEALS PROVIDES AN OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO REDEFINE FOR THE LOWER FEDERAL COURTS THE CONSTITUTIONAL PERIMETERS OF MOTIONS FOR SUMMARY JUDGMENT UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE PARTICULARLY WITH RESPECT TO CIVIL RIGHTS ACTIONS AND THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is axiomatic that on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the Court of Appeals and the District Court are required to draw inferences in the light most favorable to the non-moving party. See *Matsushita Electric Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). As stated by the Seventh Circuit in *Essex v. United Parcel Service, Inc.*, 111 F.3d 1304 (7th Cir. 1997):

> "We review the grant of summary judgment *de novo*. *Johnson v. City of Fort Wayne*, 911 3d 922, 930 (7th Cir. 1996). In evaluating a motion for summary judgment we read the record, and resolve all the inferences, in the light most favorable to the non-movant. *Id.* A court may grant summary judgment only when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.' *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2532, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(c); see also *Johnson*, 911 F.3d at 931. Although the moving party has the burden to show that the record presents no genuine issue of material fact, if the non-movant bears

the burden of proof, he must then go beyond the pleadings and affirmatively demonstrate a genuine issue of material fact for trial." *Johnson*, 91 F.3d at 931; see also *Celotex*, 477 U.S. at 323-24, 106 S.Ct. at 2552-53. To withstand summary judgment the non-movant must demonstrate that the record as a whole permits a rational fact finder to rule in his favor. *Johnson*, 91 F.3d at 931. Where the non-movant bears the burden of proof at trial . . . he must put forth "specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553 (quoting Fed.R.Civ.P. 56(e)). A mere scintilla of evidence in support of the non-movant's position is insufficient. *Anderson v. Liberty Lobby, Inc.*, 477 US. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). The question is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 251-52, 106 S.Ct. at 2512.

' . . . We review a district court's grant of summary judgment de novo.' *Brooks v. American Broadcasting Co.*, 932 F.2d 495, 500 (6th Cir. 1991). We will affirm a district court's order granting summary judgment 'only if we determine that the pleadings, affidavits, and other submissions show' that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' *Michigan Protection and Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 341 (6th Cir. 1994) (quoting Fed. R. Civ. P. 56(c)). All evidence must be viewed in the light most favorable to the non-moving party. *Matshushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). However, '[t]he moving

> party need not support its motion, with evidence disproving the non-moving party's claim, but need only show that 'there is an absence of evidence to support the non-moving party's case.' *Babin*, 18 F.3d at 341 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). *Wright v. Metrohealth Medical Center*, 58 F.3d 1130, 1133-1134 (6th Cir. 1995)."

Admittedly under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) the standards of granting summary judgment have been significantly relaxed. It is respectfully submitted that the instant case is an example, however, of a grant of summary judgment that falls well beyond the pale of even the most relaxed test. When the opinions below are carefully examined, it becomes apparent that the essential facts upon which the petitioners based their case were ignored or diluted and other less significant collateral matters – which were essentially affirmative defenses – were blown out of proportion and exalted beyond their significance. In essence the opinions did the opposite of what should have been done. They read all inferences in the light most favorable to the City of Milwaukee and acted as a jury deciding the facts.

A thorough discussion of the "New Era" in summary judgment as eminating from the United States Supreme Court decisions in *Anderson v. Liberty Lobby, Inc., supra; Celotex Corp. v. Catrett, supra* and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) is set forth by Judge Bertelsman, speaking for the Sixth Circuit in the excellent and

definitive decision of *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989). He extracts ten principles for the "New Era" summary judgment practice:

> "1. Complex cases are not necessarily inappropriate for summary judgment.
>
> 2. Cases involving state of mind issues are not necessarily inappropriate for summary judgment.
>
> 3. The movant must meet the critical burden of 'showing the absence of a genuine issue of material fact' as to an essential element of the non-movant's case.
>
> 4. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.
>
> 5. A court should apply a federal directed verdict standard in ruling on a motion for summary judgment. The inquiry on a summary judgment motion or a directed verdict motion is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'
>
> 6. As on federal directed verdict motions, the 'scintilla rule' applies, i.e., the respondent must adduce more than a scintilla of evidence to overcome the motion.
>
> 7. The substantive law governing the case will determine what issues of fact are material, and any heightened burden of proof required by the

> substantive law is an element of the respondent's case, such as proof by clear and convincing evidence, must be satisfied by the respondent.
>
> 8. The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'
>
> 9. The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.
>
> 10. The trial court has more discretion than in the 'old era' in evaluation of the respondent's evidence. The respondent must 'do more than simply show that there is some metaphysical doubt as to the material facts.' Further, '[w]here the record taken as a whole could not lead a rational trier of fact to find' for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is 'implausible.' " 886 F.2d at 1479-80. (footnotes omitted)

Applying the principles of summary judgment set forth by Judge Bertelsman to the issues presented in the case at bar it is clear that summary judgment was improvidently granted to the defendant, City of Milwaukee, by the District Court and affirmed by the Circuit Court of Appeals.

Chief Judge Posner of the Seventh Circuit observed in *Jackson v. Marion County*, 66 F.3d 151 (7th Cir. 1995) as follows:

> " . . . The pressure of heavy caseloads in the district courts (filings per judge rose from 341 in 1960 to 537 in 1993, and over this same interval the number of trial days tripled although the number of judges increased by only two and a half times) has placed strains on the Federal Rules of Civil Procedure. Those rules, drafted at a time when the federal courts were less busy, may, though constantly amended, not have kept up with the growth in federal litigation. Increasingly the rules are bent – Rule 56 to allow cases that formerly would have gone to trial to be disposed of on summary judgment, Rules 8 and 13 to allow cases that formerly would have gotten at least as far as summary judgment to be decided on the pleadings. Richard L. Marcus, 'The Revival of Fact Pleading under the Federal Rules of Civil Procedure,' 86 Colum. L.Rev. 433, 444-51 (1986); Thomas E. Willging, 'Use of Rule 12(b)(6) in Two Federal District Courts' 18 (FJC Staff Paper, Federal Judicial Center, July 1989). Most judges are pragmatists, and will allow rules to be bent when the pressure is great. But 'bent' does not mean 'broken.' *Architectural Metal Systems, Inc. v. Consolidated Systems, Inc.*, 58 F.2d 1227, 1232 (7th Cir. 1995)."

That is what has happened in the case at bar – the rules have been broken.

The effect of the grant of summary judgment to the City of Milwaukee in the District Court and the affirmance in the Decision of the Court of Appeals is that the petitioners' rights guaranteed under the Seventh Amendment to the United States Constitution have been egregiously violated. The Court of Appeals for the Third Circuit has called the right of trial by jury a "fundamental

liberty." *Lecates v. Justice of Peace Court 4 of State of Del.*, 637 F.2d 898 (3rd Cir. 1980). The District Court in New York in 1978 in *Bernstein v. Universal Pictures, Inc.*, 79 FRD 59 (1978) stated:

> "The right to a jury trial, where it exists, is so central to our system of jurisprudence that abrogation of that right must be regarded as an extreme measure of last resort." 79 FRD at 70.

As recently as January 22, 1998 the United States Court of Appeals for the Seventh Circuit declared in *Kobs v. Arrow Service Bureau, Inc.*, 134 F.3d 893 at 896-898 (7th Cir. 1998):

> "In *Sibley v. Fulton DeKalb Collection Service*, 677 F.2d 830 (11th Cir. 1982) the court held that a party upon timely demand is entitled to a jury trial in an action for damages under the FDCPA. Id. at 832. The court noted that there are two possible sources of a right of trial by jury for a statutory cause of action. Id. Congress may provide for trial by jury in the statute that creates the claim regardless of whether the claim involves rights and remedies of the type traditionally enforced in a court of law before a jury. Id. Alternatively, if the claim involves rights and remedies of the type traditionally enforced in an action at law, the Seventh Amendment requires that the right of jury trial be preserved. Id."

> "The question then is whether the Seventh Amendment(fn. 1) to the Constitution mandates a jury trial. This analysis involves a determination of whether the rights under the statute are rights that would have been resolved historically at law by a jury or in equity by a judge and whether the relief requested by the plaintiff is traditionally granted by a jury at law or by a

judge in equity. *Sibley*, 677 F.2d at 833; see *Curtis v. Loether*, 415 U.S. 189, 195-96, 94 S.Ct. 1005, 1009, 39 L.Ed.2d 260. The *Sibley* court found that because the rights under the FDCPA most resemble tort actions for collection abuses which traditionally have been viewed as being resolved at law and because the relief sought is monetary damages which is the traditional form of relief offered in the courts of law, the § 1692k(a)(2) reference to an allowance of damages by the court must be construed to anybody the right of trial by jury. *Sibley*, 677 F.2d at 834.

In reaching its decision, the Fourth Circuit relied on the Supreme Court's decision in *Curtis v. Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260, which affirmed the Seventh Circuit's decision in *Rogers v. Loether*, 467 F.2d 1110 (7th Cir. 1972). In *Curtis*, plaintiff filed a private enforcement action under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, *et seq.*, alleging racial discrimination in housing for which she requested both compensatory and punitive damages. 415 U.S. at 190, 94 S.Ct. at 1006. Defendants demand for a jury trial was denied, and the court awarded the plaintiff no actual damages and $250 in punitive damages. Id. at 191, 94 S.Ct. at 1006-1007. The Seventh Circuit reversed the district court on the jury trial issue and the Supreme Court affirmed in a unanimous decision. Id. The issue was whether a jury trial was required under 42 U.S.C. § 3612(e) which provides that '[t]he court may award to the plaintiff actual damages and not more than $1,000 punitive damages.' Finding a constitutional right to a jury trial, the Supreme Court reasoned that a damage action under Title VII is an action to enforce legal rights, sounding basically in tort,

and, more important, that the relief sought, actual and punitive damages, is the traditional form of relief offered in the courts of law. Id. at 195-96, 94 S.Ct. at 1009.

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1. The Seventh Amendment provides that '[i]n suits at common law, when the value of the controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved. * * * * *"

The District Court for the Western District of Michigan in 1983 in *Wood v. International Brotherhood of Teamsters Chauffeurs, Warehousemen & Helpers of America, Local 406*, 565 F.Supp. 1011 observed:

> "The right to trial by jury in civil cases is a basic and fundamental feature of the system of federal jurisprudence. The Supreme Court has held that courts should zealously guard against any diminution of this right. *Jacob v. City of New York*, 315 U.S. 752, 452-53, 62 S.Ct. 854, 854-55, 86 L.Ed. 1166 (1942). Indeed, the Supreme Court has held trial by jury to be the 'normal and preferable mode of disposing of issues of fact in civil cases . . . ' and that 'any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick v. Schiedt*, 293 U.S. 474, 485, 55 S.Ct. 296, 300, 79 L.Ed. 603 (1935). As the Supreme Court stated somewhat more recently, '[t]he federal policy favoring jury trials is of historic and continuing strength . . . .' *Simler v. Conner*, 372 U.S. 221-222, 83 S.Ct. 609, 610, 9 L.Ed.2d 691 (1963) . . . ."

Senior District Judge Dumbauld traced the history of the right to trial by jury in *United States of America v. One*

1976 Mercedes Benz 280S, 618 F.2d 453 (7th Cir. 1980). Therein he states:

> "Moreover, even as a matter of policy, weight must be given to the time-honored tradition of American commitment to jury trial, extending back to the Continental Congress (and, as was then believed, to the *legale judicium parium* in Magna Carta). Americans reading Blackstone's statement that 'trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law' rejoiced that even greater reverence was accorded to that cherished institution in the future kingless commonwealths of the new world. The strength of this national policy was recognized, as has been seen, by Justice Story, himself an advocate for extensive admiralty jurisdiction, when in *Parsons v. Bedford* he declared: 'The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . . One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment . . . which received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people.' Jury trial 'ranks high in our catalogue of constitutional safeguards,' according to a more recent defender of democratic institutions, the late Justice Hugo Black. He regarded the jury as 'the constitutional tribunal provided for trying facts in courts of law,'

> and declared that 'The founders of our government thought that trial of fact by juries . . . was an essential bulwark of civil liberty.' *Toth v. Quarles*, 350 U.S. 11, 16, 76 S.Ct. 1, 5, 100 L.Ed. 8 (1955); *Berry v. U.S.*, 312 U.S. 450, 453, 61 S.Ct. 637, 638, 85 L.Ed. 945 (1941); *Galloway v. U.S.*, 319 U.S. 372, 397, 63 S.Ct. 1077, 1090, 87 L.Ed. 1458 (1943)."

It is respectfully submitted that the United States Supreme Court should firmly pronounce that Federal Rule of Civil Procedure 56 cannot be utilized, as it was in the case at bar, to violate the Seventh Amendment to the United States Constitution and the duly promulgated civil rights laws of the United States. The United States District Courts and the United States Courts of Appeals are not to act as juries with respect to the claims of civil rights litigants. The petitioners in the case at bar are entitled to a meaningful day in court – an opportunity to present their case to a jury for resolution.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue to the United States Court of Appeals for the Seventh Circuit to review the Order of March 16, 2001.

Dated at Milwaukee, Wisconsin, this 6th day of June, 2001.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

ORDER OF THE UNITED STATES COURT OF APPEAL DATED MARCH 16, 2001 .....A-1 to A-13

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN DATED AUGUST 8, 2000 .....A-14 to A-25

COMPLAINT .....A-26 to A-31

PROPOSED FINDINGS OF FACT WHICH DEMONSTRATE THE GENUINE ISSUES OF MATERIAL FACT IN ACTUAL DISPUTE PURSUANT TO LOCAL RULE 6.05(b)(2) & (a)(2)....A-32 to A-34

AFFIDAVIT OF JOEL J. KINLOW IN OPPOSITION TO THE MOTION OF THE DEFENDANT FOR SUMMARY JUDGMENT.....A-35 to A-56

CERTIFIED COPY OF RESOLUTION APRIL 14, 2000 .....A-57 to A-65

ORDINANCE MAY 13, 1997 .....A-66 to A-71

ORDINANCE MAY 24, 2001 .....A-72 to A-96

TRANSCRIPT CITY OF MILWAUKEE BOARD OF ZONING APPEALS.....A-97 to A-102

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued March 6, 2001
Decided March 16, 2001

Before

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

Hon. RICHARD D. CUDAHY, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

No. 00-3159

JOEL J. KINLOW and TV-49, INC.,

Plaintiffs-Appellants,

v.

CITY OF MILWAUKEE,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin

No. 99-C-561

Thomas J. Curran, *Judge.*

ORDER

Mr. Joel Kinlow, an African-American, and Mr. Kinlow's company, TV-49, Inc. ("TV-49"), filed this suit under 42 U.S.C. §§ 1981 and 1983 alleging that the City of Milwaukee ("the City") discriminated against them based on race by denying a building permit for a television tower. The district court granted the City's motion for summary judgment, and Mr. Kinlow and TV-49 now appeal. We affirm.

I. Background

Mr. Kinlow, who is the president and sole shareholder of TV-49, has operated a television station since 1991 using a broadcast tower located in Oak Creek, Wisconsin. Desiring to become more competitive in the Southeastern Wisconsin television market, Mr. Kinlow asked Mr. Albert Dzierzak, a planning examiner for the City's Department of Building Inspection ("DBI"), what procedures he should follow to build a new television tower in Milwaukee. Mr. Dzierzak informed Mr. Kinlow that he should purchase land in Milwaukee's industrial area, obtain a survey, and apply to DBI for a permit to build the tower. Based on this information, Mr. Kinlow secured an option to purchase land at 3872 North Fratney Street in Milwaukee and procured a survey plan of the property. Mr. Kinlow did not condition the purchase of the property on his ability to obtain the federal and local permits necessary to build a broadcast tower.

A. Mr. Kinlow's Efforts to Obtain a Local Construction Permit.

In April or May of 1995, Mr. Kinlow presented his survey plan to Mr. Dzierzak. Mr. Dzierzak informed him that there would not be a problem in obtaining a permit to construct a television tower on the property. Consequently, Mr. Kinlow obtained approval to build the tower on that site from the Federal Aviation Administration ("FAA") and the Federal Communications Commission ("FCC"). He avers that the cost of obtaining these federal permits totalled $10,000 in engineering and legal fees. After receiving the FCC's approval in September 1996,

Mr. Kinlow purchased the property for $210,000. He again contacted Mr. Dzierzak, who informed him that he would need to obtain soil samples and tower footing plans to receive a local permit.[1] According to Mr. Kinlow, the cost of obtaining these plans totaled another $10,000. Mr. Kinlow presented the soil and tower footing information to Mr. Dzierzak in March 1997, and an engineering firm provided additional information regarding the site in April 1997.

Sometime later that April, Mr. Kinlow went to DBI to apply in person for the permit. Unfortunately Mr. Dzierzak was out sick and so Mr. David Kakatch, another planning examiner at DBI, reviewed Mr. Kinlow's application. Mr. Kakatch refused to grant the building permit and referred the application to Milwaukee's Board of Zoning Appeals ("the Board") because he believed the proposed tower, which would be 1,053 feet high, would be too close to an adjoining building according to Milwaukee Code of Ordinances section 295-19-8-a. Section 295-19-8-a provides that "[n]o structure other than related accessory structures shall be located within a circle having the transmitter tower as its center and a radius equal to 20% of the height of the tower or 100 feet whichever is greater."

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[1] Mr. Dzierzak explained at a deposition taken for this lawsuit that to the best of his recollection, Mr. Kinlow never filed a formal application for the tower, and that after "a couple of times on the phone" with Mr. Kinlow, Mr. Dzierzak impatiently reminded him that in order to get a permit, he had to file his papers with DBI. At the deposition, Mr. Dzierzak also confirmed that he was prepared to issue the permit as soon as Mr. Kinlow formally applied for it.

B. Mr. Kinlow's Appeal to the Milwaukee Board of Zoning Appeals

In May 1997, Mr. Kinlow appealed the denial of his permit to the Board and requested a variance from the ordinance prohibiting the construction of broadcast towers near buildings located within a radius of 20% of the proposed tower's height. On June 5, a zoning specialist at DBI informed Mr. Kinlow by letter that the board was processing his application for a variance. In the letter, the zoning specialist cited the necessity for the variance, explaining that "the distance between the proposed tower and the existing buildings does not meet the dimensions that are required by the Zoning Code," because "there appears to be 4 buildings located within 210.6 ft. of proposed tower," and "one building is located within 4.66 ft of this tower."

1. *Testimony from the Department of City Development*

On July 31, 1997, the Board held a hearing on the variance request. At the hearing, a representative of Milwaukee's Department of City Development ("DCD") testified that his Department "vehemently" opposed the variance request. The DCD representative explained that several buildings near Mr. Kinlow's proposed tower were situated within 20% of the height of the tower. Next, the representative noted that the proposed tower would be located only 151 feet away from an apartment building, even though a Milwaukee ordinance prohibits the construction of a tower within 150 feet of a residence. The representative also expressed concern that during the

winter, ice could fall off the towers, thereby hurting residents or patrons of the nearby Pick 'N Save store which was located within 150 feet of the proposed tower.

2. *The Transmission Tower Policy Statement*

During his testimony at the hearing, the representative also commented that the proposed tower would not comply with a policy objective, formally passed by the Milwaukee Common Council on March 21, 1997, entitled "the Transmission Tower Policy Statement." The "Transmission Tower Policy Statement" provides that the "policy on the placement of transmission towers can serve as a reference tool and guide for the Board of Zoning Appeals, the City Plan Commission, City Building and Zoning staff, and other City bodies and officials responsible for making decisions about the placement of transmission towers in the City of Milwaukee." Milwaukee, Wis., Substitute Resolution Approving a "Transmission Policy Statement" As Part of the Comprehensive Plan of the City of Milwaukee (March 21, 1997). According to the representative, Mr. Kinlow's tower did not meet the goals of the policy ordinance because the tower was not designed to accommodate multiple users, was not aesthetic, and Mr. Kinlow had not proposed to landscape the area surrounding the tower. Furthermore, the representative said, Mr. Kinlow's tower did not comply with the policy goal that broadcast towers should serve the entire Milwaukee metropolitan area, and therefore should not be concentrated in the city.

3. Mr. Kinlow's testimony

After hearing this testimony, the Board questioned Mr. Kinlow about his unsuccessful efforts to mount his antenna on an already existing broadcast tower and his thwarted attempts to comply with the Transmission Tower Policy Statement's goal of encouraging multi-user towers. At no point during this discussion did Mr. Kinlow indicate that his proposed tower was capable of carrying more than one antenna. Mr. Kinlow also argued that he should be granted the variance due to his reliance on Mr. Dzierzak's multiple assurances that obtaining a permit for the tower would not be a problem. Additionally, he expressed concern about the large amount of money (over $200,000) he had expended based on Mr. Dzierzak's representations about the ability to obtain a local permit. Mr. Kinlow conceded, however, that he never received written approval from Mr. Dzierzak and that he obtained the FCC and FAA permits without first applying for the local permit.

4. Other objections to the proposed tower

The Board also considered objections to the proposed tower from a representative of a Milwaukee alderman and from owners of property near the proposed site. The objectors explained that three other towers presently existed in the neighborhood and voiced concern that the area would become a "tower farm," causing a decline of nearby property value. In addition, the objectors expressed their worries regarding the safety of the tower. Nevertheless, as Mr. Kinlow's attorney pointed out during the hearing, none of the objecting neighbors owned

property located inside the 20% of tower height radius and none of the owners of land directly adjoining Mr. Kinlow's property objected to the proposed tower.

5. *The Board's decision*

After deliberating openly at the hearing, the Board concluded that Mr. Kinlow's proposed tower did not comply with the "Tower Policy Statement," and that nearby property owners would suffer a detriment to the enjoyment of their land due to safety concerns and a decrease in property values. In addition, the board decided that although Mr. Kinlow would suffer a hardship without the variance based on his expenditure of over $200,000 to secure the property, that hardship was self-imposed and purely economic (which, a board member commented, is a prohibited basis for granting a variance). Accordingly, the board denied the variance. Mr. Kinlow appealed the decision to the Milwaukee County Circuit Court, and the Circuit Court affirmed the board's decision to deny the variance.

C. Mr. Kinlow and TV-49's Federal Lawsuit

Mr. Kinlow and TV-49 subsequently filed this suit, first asserting a claim under § 1983 that the permit to construct the tower was denied without due process of law in violation of the 14th Amendment. They also raised a claim under § 1981, alleging that the denial of the permit constituted race discrimination. The City moved for summary judgment. The district court granted the motion, concluding that Mr. Kinlow and TV-49 failed to

demonstrate that, as a matter of law, they had a property right to the permit which invoked the protection of due process. The court also denied Mr. Kinlow and TV-49's claim under § 1981, reasoning that Mr. Kinlow and TV-49 did not produce evidence showing that other television companies that had received permits were members of a non-protected class or were similarly situated to Mr. Kinlow and TV-49. Mr. Kinlow and TV-49 now appeal.

II. Analysis

Preliminarily, we note that in this appeal Mr. Kinlow and TV-49 do not identify the statutory basis for their race discrimination claim. Mr. Kinlow and TV-49's complaint contains two counts: a claim under § 1983 alleging that the City denied the permit without due process of law, and a claim under 42 U.S.C. § 1981, alleging that the City denied the permit because Mr. Kinlow is an African-American, and TV-49 is an African-American owned broadcast station. The City and the district court treated these claims as the sole claims raised in the complaint, and Mr. Kinlow and TV-49 have not objected to the City's or the district court's characterization of the complaint.

On appeal, however, Mr. Kinlow and TV-49 seem to recast their race discrimination claim as an equal protection claim by arguing that under *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-66 (1977), an equal protection case, record evidence supports an inference of race discrimination. Regardless, for purposes of applying the appropriate legal standard to review the judgment on their general race discrimination claim, it

does not matter whether Mr. Kinlow and TV-49 are arguing that the City's actions violated equal protection or § 1981; to survive summary judgment on either type of claim, a plaintiff must demonstrate that similarly situated persons in an unprotected class were treated differently. *See McPhaul v. Board of Comm'rs*, 226 F.3d 558, 564 (7th Cir. 2000) (equal protection claims); *Vakharia v. Swedish Covenant Hosp.*, 190 F.3d 799, 806 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 2197 (2000) (claims under § 1981).

In its order granting summary judgment, the district court explained that other broadcasting companies to receive tower construction permits were not similarly situated to Mr. Kinlow and TV-49 because those companies "dealt with different plan examiners and were not subject to the 1997 transmission tower policy statement." We agree with the district court that Mr. Kinlow and TV-49 did not produce evidence that other broadcasting companies were similarly situated and thus they failed to make a prima facie case of either an equal protection claim, *see McPhaul* 226 F.3d at 564, or a claim under § 1981, *see Vakharia*, 190 F.3d at 806.

Mr. Kinlow and TV-49 assert that three other broadcasting companies were treated differently because they received permits to build television stations: Channel 58, Channel 24, and Channels 10-36.[2] But Mr. Kinlow and

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[2] In Mr. Kinlow and TV-49's complaint, they allege that the City also granted Channel 18 a permit to build a broadcast tower. Besides this singular mention of Channel 18, the parties have not discussed the corporate identity of the station, have not produced record evidence regarding the station, and have not explained when the station received a permit to construct a

TV-49 failed to produce evidence that would lead a trier of fact to conclude that any of these companies were similarly situated.

In June 1996, the Board granted Channel 58 (Weigel Broadcasting) permission to construct a tower in Milwaukee. Although the permit was granted approximately eight months before the Milwaukee City Council passed the Transmission Tower Policy Statement, the Board conditioned the construction of the tower on the requirement that the tower could hold at least three other antennas. Therefore, Channel 58 was not similarly situated to TV-49 because Channel 58 applied for the permit before the institution of the Policy Statement and because the company agreed to construct the tower to accommodate multiple users. *See Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617 (7th Cir. 2000) (when assessing whether parties are "similarly situated," a court must examine "all relevant factors" including whether the parties were subjected to the same standards).

Similarly, Channels 10-36 (the Milwaukee Area Technical and Adult Education District or "MATC") was granted a permit to construct a tower after the Board held a hearing regarding the proposed site. According to a City representative at the hearing, the proposed tower had the capacity to carry up to 100 broadcast stations. The City approved the permit to build the tower based

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tower. We therefore lack any informational basis to discuss whether Channel 18 was similarly situated, and deem the issue waived. *See Pond v. Michelin North America, Inc.*, 183 F.3d 592, 597 (7th Cir. 1999) (declining to consider an issue insufficiently developed in the district court).

primarily on the proposed tower's ability to comply with the Transmission Tower Policy Statement's goal to accommodate multiple users on a single tower.

With respect to Channel 24 (B & F Broadcasting), Mr. Kinlow and TV-49 contend that the company was granted a variance to build a single antenna television tower even though the tower, like Mr. Kinlow's proposed tower, did not comply with the then-existing ordinance requiring broadcast towers to be located a certain number of feet from existing structures. Despite this admittedly different treatment accorded to Channel 24, TV-49 and Channel 24 are not similarly situated in all respects. The City granted Channel 24 the permit to build its tower on February 20, 1975, over twenty years before the adoption of the Transmission Tower Policy Statement. Therefore, unlike TV-49, Channel 24 was not subject to the Tower Policy Statement's goal of encouraging multiple user broadcast towers. Furthermore, the City produced unrefuted evidence showing that none of the City officials who granted the variance to Channel 24 in 1975 were involved in the decision to deny Mr. Kinlow's application for a permit in 1997. *See id.* at 618 (When "different decision-makers are involved, two decisions are rarely similarly situated in all relevant respects." (internal quotations and citations omitted)).

Additionally, the City also produced evidence showing that the Board relied on the Transmission Tower Policy Statement to deny the permit application of another broadcast company, Channel 12 or WISN. In that application, Channel 12 simply requested to extend the height of its already existing tower by 116 feet.

In sum, Mr. Kinlow and TV-49 produced no evidence showing that they were treated differently and denied a permit based on race, while other broadcasting companies received permits even though the companies did not comply with the City's regulations. With regard to the "similarly situated" requirement, Mr. Kinlow and TV-49 merely assert that other television companies were similarly situated because Mr. Kinlow "obtained the necessary authorizations from the federal agencies and followed all of the requirements of the City to obtain a permit." But Mr. Kinlow and TV-49 ignore the City's evidence that other broadcasting companies that received permits did so either with the permission of completely different decision makers long before the 1997 Transmission Tower Policy Statement, or in compliance with the Tower Policy Statement. Mr. Kinlow and TV-49 unsuccessfully attempt to distinguish their case from the cases regarding whether a plaintiff is similarly situated by pointing out that those cases concern employment discrimination. But this court uses the same framework to analyze employment discrimination claims, claims under § 1981, and equal protection arguments. *See McPhaul*, 226 F.3d at 566, n. 6 (§ 1983 and Title VII cases examined under the same standard); *Vakharia*, 190 F.3d at 806 (employment discrimination and § 1981 claims analyzed under the same standard); *Riordan v. Kempiners*, 831 F.2d 690, 695-96 (7th Cir. 1987) (same methods of proof utilized in Title VII and equal protection cases). Accordingly, the grant of summary judgment to the City was proper.

On a final note, Mr. Kinlow and TV-49 also cite *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2nd Cir. 2000), for the proposition that because Mr. Kinlow

obtained authorizations from the FAA and the FCC to build the tower, the City of Milwaukee is preempted from denying the permit. The Second Circuit's *Freeman* decision, which concerns the ability of local zoning board to regulate radio frequencies, does not discuss preemption of a local zoning authority's power to limit the number of broadcast towers in a city or to keep towers distanced from pre-existing structures. Rather, *Freeman* holds that federal communications law preempts a local zoning authority's ability to condition the grant of a broadcast tower construction and use permit on a radio frequency interference requirement. *Id.* at 325. Because in this case the City's denial of Mr. Kinlow's application had nothing to do with the regulation of broadcast frequency interference, the *Freeman* case is inapplicable.

III. Conclusion

Because Mr. Kinlow and TV-49 have not demonstrated that the broadcast companies who were granted permits to build broadcast towers were similarly situated to Mr. Kinlow and TV-49, we AFFIRM the district court's grant of summary judgment to the City.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOEL J. KINLOW and TV-49, INC.,

Plaintiffs, Case No. 99-C-561

v.

CITY OF MILWAUKEE,

Defendant.

DECISION AND ORDER

FILED AUG 8 2000

Joel J. Kinlow, an African American, sought a permit to build a television tower in the City of Milwaukee. The tower was to carry the signal of a co-Plaintiff, TV-49, Inc., a corporation with which Kinlow is associated. When the permit was denied, Kinlow and TV-49 sued the City claiming that the permit was denied because of Kinlow's race. They are seeking monetary and injunctive relief under 42 U.S.C. §§ 1981 and 1983. The Plaintiffs claim that both of them suffered direct economic injury due to the acts of the City of Milwaukee. Therefore, they have made a showing that they have standing and this court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 & 1343.

The City has answered and has denied liability. After the deadline for the completion of discovery expired, the City moved for summary judgment on the grounds that no material facts are in dispute and that it is entitled to judgment as a matter of law. *See* Federal Rule of Civil Procedure 56(c).

I. FACTS

The parties have proposed facts supporting their respective positions. The facts upon which they agree, plus other facts contained in the record, which show that:

Plaintiff Joel J. Kinlow is an African American. He says that he is the sole shareholder of co-Plaintiff TV-49, Inc. In 1997, Kinlow applied in his own name for a permit to construct a television tower at 3872 North Fratney Street in the City of Milwaukee.

Kinlow began the application process at the Milwaukee plan examiner's office. He dealt with Plan Examiner II Albert Dzierzak. Kinlow alleges that Dzierzak led him to believe that there would be no problem obtaining a permit. Claiming to rely on Dzierzak's representations, Kinlow purchased the Fratney Street property for $210,000.00. The offer to purchase the property was not made contingent upon obtaining the permit. The record shows that Joel J. Kinlow and Arvis K. Kinlow became the fee owners of the Fratney Street real estate. *See* Affidavit of Jan A. Smokowicz in Support of Defendant's Motion for Summary Judgment at Exhibit A.

After Kinlow sought necessary authorizations from the Federal Aviation Administration and the Federal Communications Commission as well as soil samples and engineering reports, he returned to the Milwaukee plan examiner's office where he learned that Dzierzak was on sick leave. He then dealt with David Kakatsch, a Plan Examiner III. Kakatsch denied the permit on the ground that the planned structure would violate a City Ordinance (Zoning Code § 295-19-8-a) because it would be too close to four other existing buildings.

Kinlow then sought a variance from Milwaukee's Board of Zoning Appeals. Despite Kinlow's representation that adjacent property owners did not oppose the tower, statements of opposition had been received from other property owners. After a hearing, the Board denied the variance because Kinlow's plan did not meet all the criteria required for a variance. *See* Affidavit of Jan A. Smokowicz in Support of Defendant's Motion for Summary Judgment at Attachment A, pp. 0049-0055 (Board of Zoning Appeals hearing of July 31, 1997) (discussing the five criteria needed to win a variance). The Board was unable to find that: (1) the variance would not be inconsistent with the spirit, purpose and intent of the regulations of the district in which it was required; (2) there were exceptional circumstances; (3) the variance was necessary for the preservation of property rights and the enjoyment of the same substantial property rights which were possessed by the other properties in the same district and the same vicinity; (4) the variance would not create substantial detriment to adjacent property and would not materially impair or be contrary to the spirit, purpose or intent of the zoning code or the public interest; and (5) the alleged difficulty or hardship was not self-imposed or based solely on economic grounds.

In denying the variance, the Board cited safety concerns and rejected Kinlow's claim of economic hardship as a valid ground for granting the variance. In addition, the Board found that the application was inconsistent with the City's Transmission Tower Policy Statement which had been adopted by the Common Council of the City of Milwaukee on March 21, 1997. This policy, which was meant to be used as a reference tool and guide by the

Board of Zoning Appeals and others responsible for making decisions about the placement of transmission towers in Milwaukee, favored curtailing and reducing the number of towers. Applicants for permits were to be encouraged to erect towers to accommodate multiple transmission systems. The Board did not favor Kinlow's proposed tower because it would not have provided service for more than one television station.

Following the Board's denial, Kinlow sought judicial review of the decision in the Circuit Court of Milwaukee County. On December 23, 1998, that court issued a decision affirming the decision of the Board of Zoning Appeals. On May 21, 1999, the Plaintiffs commenced the instant action in federal court claiming that their rights to due process and equal protection had been violated.

II. LEGAL STANDARDS FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56(c), a party moving for summary judgment must show that the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986); *McGraw-Edison Company v. Walt Disney Productions*, 787 F.2d 1163, 1167 (7th Cir. 1986). When faced with a properly supported motion for summary judgment, the nonmovants may not avoid judgment by simply resting on their pleadings. If the nonmovants bear the burden of persuasion on an issue at trial, they must

affirmatively demonstrate, by specific showings, that there is a genuine issue of material fact requiring a trial. *See First National Bank of Cicero v. Lewco Securities Corporation*, 860 F.2d 1407, 1411 (7th Cir. 1988).

A "genuine" factual issue is one that properly can be resolved only by a finder of fact because it may reasonably be resolved in favor of either side. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248.

A summary judgment procedure is not meant to be a trial on affidavits. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The inferences are to be drawn in [the nonmovants'] favor." *Id.* at 255. At the summary judgment stage the judge's function is to determine whether there is sufficient evidence favoring the nonmoving parties for a jury to return a verdict for those parties. *See First National Bank of Arizona v. Cities Service Company*, 391 U.S. 253, 288-89 (1968). This inquiry implicates the substantive evidentiary standard of proof that would apply at a trail on the merits. Thus, in a civil case such as this, the record must show that the trier of fact could find by a preponderance of the evidence that the Plaintiffs are entitled to a judgment in their favor. *See Anderson*, 477 U.S. at 252. If the Plaintiffs' evidence is merely colorable, or is not

significantly probative, summary judgment may be granted. *See Id.* 249-50.

A summary judgment motion will not be denied merely on the basis of a "metaphysical doubt" about the facts, *Mitsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586 (1986), "or on the basis of conjecture or surmise," *Bryan v. Maffucci*, 923 F.2d 979, 982 (2d Cir.), *cert. denied*, 112 S. Ct. 152 (1991). Courts need not be reluctant to grant summary judgment in appropriate cases since "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims." *Celotex Corporation v. Catrett*, 477 U.S. at 323-24.

Guided by these standards, the court will now proceed to determine whether the City of Milwaukee is entitled to judgment under the applicable law, which, in this case, is found in 42 U.S.C. §§ 1981 & 1983 and the case law decided thereunder.

III. DISCUSSION AND DECISION

A. DUE PROCESS

Kinlow's "First Cause of Action" is that he was deprived of due process in "violation" of 42 U.S.C. § 1983, the Fourteenth Amendment, and Article I of the Wisconsin Constitution. The Complaint does not specify what kind of due process claim the Plaintiffs are making. In moving for summary judgment, the Defendant guesses that it must be procedural due process. The court believes that it could be substantive due process. But, in either case, the Plaintiffs must make a threshold showing that

they possess a state law right to the property that is the subject of their claim. *See Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 82 (1978); *Draghi v. County of Cook*, 184 F.3d 689, 691 (7th Cir. 1999).

In this case, the Plaintiffs say that the property at issue is the permit to build the television transmission tower. *See* Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment at 20. However, they have made no showing that they had a property right to this permit under Wisconsin law. The only authority they cite in support of their claimed right is *Board of Regents v. Roth*, 408 U.S 564, 577 (1972). Although the *Roth* case originated in Wisconsin, it has nothing to do with building permits. Because the Plaintiffs have made no showing that they can prove this essential element of their claim, summary judgment will be granted on the Plaintiff's due process cause of action.[1]

B. SECTION 1981

Next, the Plaintiffs allege that they are entitled to relief under 42 U.S.C. § 1981 because they were denied

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[1] In addition, the Plaintiffs have failed to make the threshold showing necessary to impose municipal liability. They have failed to identify a discriminatory policy or practice of the City of Milwaukee or, in the alternative, they have failed to show that Plan Examiner David Kakatsch, who the Plaintiffs blame for the decision to deny the permit, was a high level policymaker for the City of Milwaukee. *See Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 404 (1997); *Hulbert v. Wilhelm*, 120 F.3d 648, 655-56 (7th Cir. 1997).

the permit due to the fact that Joel Kinlow is an African American. Section 1981 provides that:

> **(a) Statement of equal rights**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> **(b) "Make and enforce contracts" defined**
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> **(c) Protection against impairment**
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

The court has examined the depositions and documents the Plaintiffs plan to offer at trial, as well as the Final Pretrial Reports, and finds that the Plaintiffs have no direct proof that racial bias motivated the City of Milwaukee or Plan Examiner David Kakatsch who the Plaintiffs have identified as the decision-maker in regard

to the permit. *See* Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment at 9. *See also* Proposed Findings of Fact Which Demonstrate the Genuine Issues of Material Fact in Actual Dispute Pursuant to Local Rule 6.05(b)(2) & (a)(2) at ¶ 5.

The Plaintiffs maintain that they can prove discrimination by an indirect method. Thus, the Plaintiffs must show that "a similarly situated [person] in an unprotected class was more favorably treated." *Gonzalez v. Ingersoll Milling Machine Company*, 133 F.3d 1025, 1035 (7th Cir. 1998). *See also Vakharia v. Swedish Covenant Hospital*, 190 F.3d 799, 806 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 2197 (2000). Kinlow says that he is an African American and that he is the sole shareholder of TV-49, Inc. which has suffered discrimination because of its association with him. The Plaintiffs then allege that Kinlow was denied the permit while other businesses, which the Plaintiffs say were similarly situated but not in a protected class, were granted tower permits by the City. From this, the Plaintiffs conclude that Kinlow was denied the permit because of his race.

The record shows that various other businesses have sought tower permits from the City of Milwaukee over the years. These businesses include Milwaukee Area Technical College's Channels 10/36, The Journal Company's Channel 4, Hearst-Argyle Stations, Inc.'s Channel 12, Weigel Broadcasting Company's Channel 58, and B & F Broadcasting, Inc.'s Channel 24. However, the record does not show that these business entities have any particular racial identities or that they were owned by sole shareholders who were not in a protected class. By

merely asserting that these entities are "similary situated" entities in an "unprotected class," the Plaintiffs are assuming facts not in evidence. These entities appear to be corporations and, as a matter of law, corporations have no racial identity except, under some circumstances, for purposes of standing. *See Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 262 (1977); *Triad Associates, Inc. v. Robinson*, 10 F.3d 492, 499 & n.5 (7th Cir. 1993); *Lauer Farms, Inc. v. Waushara County Board of Adjustment*, 986 F. Supp. 544, 552 (E.D. Wis. 1997).

As the City argues, the showing concerning these other businesses is not material.[2] Therefore, because the Plaintiffs have not met their burden of establishing that similarly situated entities in an unprotected class were treated more favorably, which is an essential element of their Section 1981 claim, summary judgment must be granted.

ORDER

For these reasons, the court ORDERS that the "Defendant's Motion for Summary Judgment" (filed April 18, 2000) IS GRANTED on all federal claims contained in the Complaint. *See* Federal Rule of Civil Procedure 56(c). All state law claims are dismissed without prejudice. *See* 28 U.S.C. § 1367(c)(3).

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[2] Besides the Plaintiff's inability to show that the other businesses were in an unprotected class, the City has made a showing that those businesses were not similarly situated because the other businesses dealt with different plan examiners and were not subject to the 1997 transmission tower policy statement.

IT IS FURTHER ORDERED that this action be dismissed upon its merits.

IT IS FURTHER ORDERED that the Clerk of Court shall enter a final judgment as a separate document. *See* Federal Rule of Civil Procedure 58. This judgment shall provide that:

> This action came on for hearing before the court, the Honorable Thomas J. Curran, District Judge, presiding, and the issues having been heard and a decision having been rendered.
>
> IT IS ORDERED AND ADJUDGED
>
> that Plaintiffs Joel J. Kinlow and TV-49, Inc. take nothing and that this action is dismissed upon its merits and that the Defendant City of Milwaukee recover of the Plaintiffs its costs of this action.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin, this 8th day of August, 2000.

/s/ Thomas J. Curran
Thomas J. Curran
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN District of WISCONSIN

JOEL J. KINLOW and TV-49, INC.,	JUDGMENT IN A CIVIL CASE
v.	CASE NUMBER: 99-C-561
CITY OF MILWAUKEE	(Filed Aug. 8, 2000)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to hearing before the court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiffs Joel J. Kinlow and TV-49, Inc. take nothing and that this action is Dismissed upon its merits and that the Defendant City of Milwaukee recover of the Plaintiffs its costs of this action.

Dated: August 8, 2000

SOFRON B. NEDILSKY, Clerk

/s/ D. McLeod
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOEL J. KINLOW and
TV-49, INC.,

Plaintiffs,

vs.

CITY OF MILWAUKEE,

Defendant.

Civil Action

Case No. 99-C-0561

CURRAN

(Filed May 21, 1999)

The plaintiffs, Joel J. Kinlow and TV-49, Inc. by their attorney, Robert E. Sutton, as and for their complaint against the defendant allege as follows:

JURISDICTION AND VENUE

This is an action for money damages and equitable relief arising from violations of 42 U.S.C. §§ 1981 and 1983 commonly known as the Civil Rights Act of 1871.

PARTIES

1. The plaintiff, Joel J. Kinlow, is an adult resident of Milwaukee County, Wisconsin. He is an African-American and at all times material herein was the President and sole shareholder of TV-49, Inc. with offices located at 4311 East Oakwood Road, Oak Creek, Wisconsin 53154.

2. The plaintiff, TV-49, Inc. is a corporation and at all times material herein was engaged in the business of

television transmission of Channel 49 with offices located at 4311 East Oakwood Road, Oak Creek, Wisconsin 53154.

3. The defendant, City of Milwaukee, is a municipal corporation organized and existing under the laws of the State of Wisconsin with offices located at 200 East Wells Street, Milwaukee, Wisconsin 53202.

FACTS

4. Commencing in 1981 and continuing through 1989 the plaintiff, Joel J. Kinlow, obtained the necessary authorizations from the FCC, construction permits from the appropriate municipal authorities, obtained necessary financing, purchased land and built a television station which is located on ten acres of land in Milwaukee County and designated Channel 49.

5. Channel 49 went on the air in 1990 and has continued operation at 4311 East Oakwood Road, Oak Creek, Wisconsin from 1990 to the present date. The plaintiff, Joel J. Kinlow, as President and shareholder of the plaintiff, TV-49, Inc., desiring to become more competitive in the television market in southeastern Wisconsin in 1995 embarked on a project to obtain property and build a higher transmission tower to be located in the City of Milwaukee.

6. In order to achieve the plaintiff's purpose to build a higher tower in Milwaukee, Wisconsin the plaintiff filed with the FAA, the Federal Aviation Administration, an application for the construction of the new tower antenna in Milwaukee and received the appropriate authorization from the FAA.

7. In 1995 the plaintiff, Joel J. Kinlow, approached officials of the City of Milwaukee Planning Department requesting the appropriate procedures that he should follow in order to build a television transmitter tower in the City of Milwaukee. He was advised by the duly authorized agents of the City of Milwaukee that he should find a parcel of land available for sale in the industrial zone of the City of Milwaukee, bring a plan of survey to the officials so they could determine whether or not the site was acceptable.

8. Acting in reliance upon the advice of the officials of the city of Milwaukee the plaintiff, Joel J. Kinlow, secured an option to purchase property at 3872 Fratney Street in the industrial zone of the City of Milwaukee, had a plan of survey prepared and presented it to the City of Milwaukee Planning Department. After review of the plan of survey the officials of the City of Milwaukee Planning Department advised the plaintiff there would be no objection by the City of Milwaukee to the construction of a television tower at 3872 Fratney Street.

9. Acting in reliance on the advice of the officials of the City of Milwaukee Planning Department the plaintiff purchased the property at 3872 Fratney Street for Two Hundred Ten Thousand Dollars ($210,000.00). He was also advised by the officials of the City of Milwaukee Planning Department that he should obtain soil samples and tower footing plans which the plaintiff did at the cost of Ten Thousand Dollars ($10,000.00).

10. On September 17, 1996, the FCC, the Federal Communications Commission, granted clearance of the

plaintiff's application to construct the television tower at 3872 Fratney Street, Milwaukee, Wisconsin.

11. From September 17, 1996 to the present date the City of Milwaukee has refused to allow the plaintiff, Joel J. Kinlow, to build the television transmission tower on the property located at 3872 Fratney Street.

12. The actions of the City of Milwaukee in refusing to allow the plaintiff to construct the television tower at 3872 Fratney Street are pursuant to a custom or policy of discrimination against the plaintiff because of his race, African-American, because from 1952 through 1999 the City of Milwaukee has repeatedly granted permission and authorization to construction of television towers to similarly situated white owners of television stations.

13. All of the reasons given by the City of Milwaukee in refusing to grant permission to the plaintiff to construct the tower on the property located at 3872 Fratney Street are pretextual because other companies owned by white persons have been granted permission to construct television towers although the identical objections could have been interposed against the construction of those television towers specifically Channel 58 which is owned by the Weigel Broadcasting Company and one Howard Shapiro who was allowed to construct a television tower by the City of Milwaukee in 1996 or 1997 and Channel 24 and Channel 18 and Channels 10-36.

14. Upon information and belief the plaintiff, Joel J. Kinlow, an African-American, is the only owner of a commercial television company who has been denied permission to build a television tower by the City of Milwaukee.

15. As a result of the discrimination against the plaintiff by the City of Milwaukee he has been damaged as follows:

(a) Two Hundred Ten Thousand Dollars ($210,000.00) for purchase of the land.
(b) Ten Thousand Dollars ($10,000.00) for soil samples and tower footing plans.
(c) Thirty-Five Thousand Dollars ($35,000.00) attorney's fees.
(d) Five Thousand Dollars ($5,000.00) engineering fees.
(e) The loss of at least Five Hundred Thousand Dollars ($500,000.00) of revenues for TV-49, Inc. annually.
(f) Diminished value of TV-49, Inc. of at least Ten Million Dollars ($10,000,000.00).

FIRST CAUSE OF ACTION

16. The actions of the defendant, City of Milwaukee, as set forth above in ¶¶ 1 through 15 constitute deprivation of the property of the plaintiff under color of law without due process of law in violation of 42 U.S.C. § 1983, the Fourteenth Amendment to the United States Constitution and Article 1, § 1 of the Wisconsin Constitution.

SECOND CAUSE OF ACTION

17. The actions of the defendant, City of Milwaukee, as set forth in ¶¶ 1 through 15 above constitute discrimination against the plaintiff because of his race, African-

American, under color of law in violation of 42 U.S.C. § 1981, the Fourteenth Amendment to the United States Constitution and Article 1, § 1 of the Wisconsin Constitution.

WHEREFORE, the plaintiff demands judgment as follows:

(1) Compensatory damages in an amount to be determined but not less than Eleven Million Dollars ($11,000,000.00).
(2) Injunctive relief and declaratory judgment directing that TV-49, Inc. be allowed to construct a television tower at 3872 Fratney Street, Milwaukee, Wisconsin.
(3) Costs, disbursements and reasonable attorney's fees pursuant to 42 U.S.C. § 1988.
(4) Such other relief as may be appropriate.

PLAINTIFF HEREBY DEMANDS TRIAL BY JURY

Dated at Milwaukee, Wisconsin, this 21st day of May, 1999.

/s/ Robert E. Sutton
Robert E. Sutton
State Bar No. 1008459
Attorney for Plaintiffs

2631 N. Downer Avenue
Milwaukee, WI 53211
(414) 961-0802

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOEL J. KINLOW and
TV-49, INC.,

Plaintiffs,

vs.

CITY OF MILWAUKEE,

Defendant.

Civil Action

Case No. 99-C-561

(Filed May 17, 2000)

PROPOSED FINDINGS OF FACT WHICH DEMONSTRATE THE GENUINE ISSUES OF MATERIAL FACT IN ACTUAL DISPUTE PURSUANT TO LOCAL RULE 6.05(b)(2) & (a)(2)

1. The plaintiff is an African-American. See Affidavit of plaintiff, ¶ 1.

2. Albert Dzierzak, the plan examiner, involved in approving the building permit for the City of Milwaukee to the plaintiff testified he would have issued the permit to the plaintiff if the plaintiff had provided the required data. See line 3, page 5 to line 15, page 7, line 13, page 10 to line 11, page 11, line 18, page 13 to line 1, page 14 and line 25, page 18 to line 3, page 19 of the deposition of Albert Dzierzak.

3. The plaintiff claims he provided all the data requested by Albert Dzierzak. See Affidavit of plaintiff, ¶¶ 5 through 13.

4. Albert Dzierzak claims the plaintiff did not provide the requested data. Line 13, page 18 to line 12, page 10, line 2, page 14 to line 9, page 14 and line 14, page 15 to line 2, page 16 of the deposition of Albert Dzierzak.

5. David Kakatsch who denied the permit to the plaintiff claims he denied the permit because the building of the tower would violate city ordinance. Line 17, page 25 to line 8, page 26, line 4, page 27 to line 6, page 27, line 4, page 29 to line 23, page 30 of the deposition of David Kakatsch.

6. David Kakatsch admits this is the only time the City of Milwaukee has denied a permit to construct a television tower. Line 3, page 31 to line 5, page 31, line 19, page 31 to line 23, page 31, line 3, page 37 to line 7, page 37, line 18, page 37 to line 4, page 38, line 9, page 39 to line 18, page 39 of the deposition of David Kakatsch.

7. On the record, the plaintiff appears to be the only African-American owned company to seek a permit to build a television tower from the City of Milwaukee. Line 11, page 16 to line 17, page 16 of the deposition of Albert Dzierzak

8. The plaintiff obtained all authorizations, permissions and waivers required by the Federal Aviation Administration and Federal Communications Commission. Affidavit of plaintiff, ¶¶ 5 to 7.

9. On the record it appears that all companies owned by non-African-Americans that obtain the necessary federal authorizations and request permits to build transmission towers have been granted permits by the City of Milwaukee, deposition of Michael D'Amato, line 18, page 6 to line 19, page 12, line 2, page 22 to line 17, page 22, line 7, page 24 to line 12, page 24, line 19, page 25 to line 23, page 25; Deposition of Suzanne Hanson, line 11, page 12 to line 21, page 12, line 2, page 13 to line 21,

page 13. Also see Statement of Facts of Defendant, ¶¶ 11, 12, Affidavit of Plaintiff, ¶¶ 20 to 25, 41 to 47.

10. The City of Milwaukee granted a permit to Channel 24 which appears to have violated the ordinance, Code Section 29F.19-8-a. Affidavit of Plaintiff, ¶¶ 20 to 25.

Dated at Milwaukee, Wisconsin, this 17th day of May, 2000.

/s/ Robert E. Sutton
Robert E. Sutton
Attorney for Plaintiffs

2631 N. Downer Avenue
Milwaukee, WI 53211
(414) 961-0802

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOEL J. KINLOW and
TV-49, INC.,

Plaintiffs,

vs.

CITY OF MILWAUKEE,

Defendant.

Civil Action

Case No. 99-C-561

(Filed May 17, 2000)

AFFIDAVIT OF JOEL J. KINLOW IN OPPOSITION TO THE MOTION OF THE DEFENDANT FOR SUMMARY JUDGMENT

Joel J. Kinlow, being duly sworn on oath deposes and states as follows:

1. I am an African-American and at all times relevant to this lawsuit have been the President and sole shareholder of TV-49, Inc.

2. TV-49, Inc. at all times relevant to this lawsuit has been engaged in the business of television transmission.

3. I purchased land located at 4311 East Oakwood Road, Oak Creek Wisconsin and caused a television station to be built on the land which television station is owned by TV-49, Inc. and went on the air in 1990 and has continued operation to the present date.

4. In 1995 I desired to build a transmission tower in the City of Milwaukee. I wanted to build the tower in Milwaukee because it would be a higher tower and afford TV-49, Inc. to be competitive with other television stations in Southeastern Wisconsin.

5. I caused to be filed the appropriate applications for the construction of the new tower with the Federal Aviation Administration and to Federal Communications Commission, the federal agencies that govern the construction of television towers. Before I obtained the authorization from the Federal Aviation Administration I went to the Office of the City of Milwaukee Planning Department in the early part of 1995 and was referred to Mr. Albert Dzierzak who I was given to understand had the responsibility for authorizing a site for the construction of the television tower on behalf of the City of Milwaukee. Mr. Dzierzak advised me that I should purchase a parcel of land in the industrial zone in the City of Milwaukee and obtain a survey and provide it to him so he could determine whether or not the site was acceptable.

6. I thereafter secured an option to purchase property at 3872 North Fratney Street which was in the industrial zone of the City of Milwaukee suggested by Mr. Dzierzak. I caused a plan of survey to be prepared and presented it to Mr. Dzierzak in approximately April or May of 1995. Mr. Dzierzak told me that I would have no problem at all in obtaining permission to construct a television tower on that property. He specifically advised me that it would not be necessary for me to obtain any kind of variance or appear before the Board of Zoning Appeals.

7. Acting in reliance on Mr. Dzierzak's representations I caused to be filed with the Federal Aviation Administration the appropriate requests for permits and received them in approximately June or July of 1995. I also caused to be filed the appropriate applications with

the Federal Communications Commission and received clearance from the Federal Communications Commission on September 17, 1996 granting my application to construct a television tower at 3872 North Fratney Street. Attached hereto and made a part hereof marked Exhibit 1 is a copy of the approval. I also was required to obtain a special waiver from the Federal Communications Commission which was granted on September 17, 1996. Attached hereto and made a part hereof marked Exhibit 2 is a copy of the waiver.

8. I then purchased the property at 3872 North Fratney Street for Two Hundred Ten Thousand Dollars ($210,000.00) in October of 1996.

9. I then contacted Mr. Dzierzak and he advised me that I should obtain soil samples and tower footing plans which I did at an additional cost of Ten Thousand Dollars ($10,000.00).

10. The cost of obtaining the approval and authorizations from the Federal Aviation Administration and Federal Communications Commission was approximately Ten Thousand Dollars ($10,000.00) for fees for engineering and legal fees.

11. I personally took the soil samples and tower footing plans to Mr. Dzierzak and gave them to him. The last time I talked to Mr. Dzierzak in March of 1997 I contacted Mr. Dzierzak by telephone and asked him when the permit would be issued and he told me there were some things to be ironed out but to contact him in about two weeks.

12. I received a letter from Paul J. Ford and Company dated April 4, 1997, a copy of which is attached hereto and made a part hereof marked Exhibit 3, which advised that Mr. Dzierzak had been provided with all the additional materials so that the matter was "ironed out" and I expected the permit to be issued.

13. Sometime immediately after April 4, 1997 I appeared at the office of the City of Milwaukee Planning Department and asked to see Mr. Dzierzak. I was told that Mr. Dzierzak was sick and I was referred to another gentleman whose name I do not know. He as also a white man as is Mr. Dzierzak. That man was getting ready to write the permit and he said hold on a minute and he went somewhere and came back and introduced me to Mr. David Kakatch. Mr. David Kakatch told me that I could not build the television tower there because it was too close to an adjoining building and Mr. Kakatch refused to issue the permit.

14. The Resolution of March 21, 1997 referred to in ¶¶ 13 through 18 of the Statement of Facts presented in the Defendant's Brief In Support Of Motion For Summary Judgment did not apply to my project because I had received oral approval of the project from Mr. Dzierzak as a duly authorized representative of the City of Milwaukee prior to March 21, 1997.

15. The enforcement of the regulations in the Milwaukee Code of Ordinances referred to in ¶¶ 21 through 30 was arbitrary and capricious and based in part on false testimony particularly that recited in ¶ 26. I had personally contacted the owners of the adjoining properties and they had assured me that they had no objection to the

construction of the tower. Since the person who signed the affidavit did not appear before the Board of Zoning Appeals my attorneys were unable to cross-examine or test the veracity of the affidavit. The objectors to the tower noted in ¶ 26 of the Statement of Facts of the defendant were not owners of adjoining properties. The affidavit of Jerry Knoerr refers to property located at 925 East Abert Place which is across the alley from the property at 3872 North Fratney Street and the fax from Tom Steepy refers to property located at 3875 North Humboldt Boulevard which the fax claims "abuts" the requesting property on the east border." I don't understand what that means but the fact is that property does not adjoin the property at 3872 North Fratney Street.

16. I was advised by Alderman D'Amato between March of 1997 and July of 1997 that he was going to prevent me from building a tower at all costs. I would note that Mr. D'Amato is also white. As a matter of fact during this entire process I would note that there were no African-Americans on the Board of Zoning Appeals, none that I dealt with in the Plan Examiner's Office and the only African-American who was involved at any time for the City of Milwaukee was Mr. Edward Richardson who had not been involved in any way with the determination that the Weigel Broadcasting Company could build their transmission tower at 5215 North Menomonee River Parkway and I could not build mine on Fratney Street.

17. In ¶¶ 4 through 12 of the Statement of Facts the City of Milwaukee attempts to justify the grant of the variance to the Weigel Broadcasting Company which had no African-American ownership on the basis that the " . . . Weigel tower had the capacity to hold up to three

television antennae owned by Weigel and up to ten antenae owned by Milwaukee County and the capacity for at least three additional full-power antennae from other broadcasters." Had the Board of Zoning Appeals inquired of me of my tower's capacity I would have advised them that it would have the capacity to hold additional antennae but the Board of Zoning Appeals didn't ask me. It is clear to me that I was held to a different standard than the Weigel Broadcasting Company or indeed all other companies that were owned by non African-Americans and were allowed to build towers.

18. In ¶¶ 41 through 47 of the Statement of Facts the City of Milwaukee sets forth the preferential treatment given by the Board of Zoning Appeals to the MATC tower and again includes justification for awarding the permit in November of 1997 which is a mere four months after mine was denied with a number of justifications all of which could have been applied to my tower.

19. In ¶¶ 48 through 59 of the Statement of Facts the City of Milwaukee discusses an action by the Board of Zoning Appeals denying a request of an extension to the height of a television transmitter on behalf of WISN, division of the Heart Corporation which denial occurred in August of 1999 and is presently on appeal. It is clear from that that WISN had already obtained approval to construct a television tower sometime in the past and an extension of height of an existing television tower is not what I was requesting. Additionally I do not understand how that is relevant.

20. I have personally investigated the Channel 24 tower located directly behind 3950 North Holton. According to public records this tower is 1,039 feet tall.

21. Code Section 295-19-8-a, before recent revision, provided that no structure be located within a circle having a transmitter tower as its center and a radius equal to 20% of the height of the tower. This Code section was enacted in 1952.

22. Under this section of the Code, the Channel 24 tower should have been located at least 200 feet from the nearest building.

23. The Channel 24 tower appears to be located closer than 200 feet to at least two buildings.

24. There is no Board of Zoning Appeals record of a locational variance being granted for the Channel 24 tower.

25. The Channel 24 tower was in existence in 1997 when the City of Milwaukee Department of Building Inspection applied Section 295-19-8-a to my proposed transmitter tower requiring it be located at least 200 feet from nearby buildings.

26. I make this Affidavit in opposition to the Motion Of The Defendant For Summary Judgment.

/s/ Joel J. Kinlow
Joel J. Kinlow

Subscribed and sworn to before me
this 12th day of May, 2000.

/s/ Susan J. Johnson
Notary Public, State of Wisconsin
My Commission expires 10/13/02

[SEAL]

United States of America

FEDERAL COMMUNICATIONS COMMISSION

TELEVISION BROADCAST STATION CONSTRUCTION PERMIT

Official Mailing Address:

TV-49, INC.
4311 EAST OAKWOOD ROAD
OAK CREEK, WI 53154

Cali Sign: WJJA

Permit File No.:
BPCT-960328KG

Authorizing Official:

/s/ Clay C. Pendarvis
Clay C. Pendarvis
Chief, TV Branch
Video Services Division
Mass Media Bureau

Grant Date: 9/17/96

This permit expires 3:00 a.m. local time, 24 months after grant date specified above.

Subject to the provisions of the Communications Act of 1934, as amended, subsequent acts and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions set forth in this permit, the permittee is hereby authorized to construct the radio transmitting apparatus herein described. Installation and adjustment of equipment not specifically set

forth herein shall be in accordance with representations contained in the permittee's application for construction permit except for such modifications as are presently permitted, without application, by the Commission's Rules.

This permit shall be automatically forfeited if the station is not ready for operation within the time specified (date of expiration) or within such further time as the Commission may allow, unless completion of the station is prevented by causes not under the control of the permittee. See Sections 73.3598, 73.3599 and 73.3534 of the Commission's Rules.

Equipment and program tests shall be conducted only pursuant to Sections 73.1610 and 73.1620 of the Commission's Rules.

Name of Permittee:

TV-49, INC.

Station Location:

WI-RACINE

Frequency (MHz): 680.0 - 686.0

Carrier Frequency (MHz): 681.26 Visual 685.76 Aural

Channel: 049

Hours of Operation: Unlimited

Transmitter location (address or description):

3872 N. FRATNEY STREET,
MILWAUKEE, MILWAUKEE COUNTY, WI

Transmitter: Type Accepted. See Sections 73.1660, 73.1665 and 73.1670 of the Commission's Rules.

Antenna type: (directional or non-directional): Directional

Description: ANDREW CORP ATW30H3-HSC2-49H

Beam Tilt: 0.75 Degrees Electrical

Major lobe directions (degrees true): 214.0 326.0

Antenna Coordinates:
North Latitude: 43 5 15
West Longitude: 87 54 1

Transmitter output power.....: As required to achieve authorized ERP

Maximum effective radiated power (PEAK): 5000.0 kW
: 37.0 DBK

Height of radiation center above ground .....: 282 Meters

Height of radiation center above mean sea level.....: 480 Meters

Height of radiation center above average terrain.....: 273 Meters

Antenna structure registration number.....: none

Overall height of antenna structure above ground (including obstruction lighting if any) .....: 290 Meters

Obstruction marking and lighting specifications for antenna structure:

It is to be expressly understood that the issuance of these specifications is in no way to be considered as precluding additional or modified marking or lighting as may hereafter be required under the provisions of Section 303(q) of the Communications Act of 1934, as amended.

PARAGRAPH B . , FCC FORM 715-A (MAY 1985):

There shall be installed at the top of the skeletal or other main support structure three or more high intensity light units which conform to FAA/DOD Specification L-856 High Intensity Obstruction Lighting Systems. The complement of units shall emit a white high intensity light and produce an effective intensity of not less than 200,000 candelas (daytime) uniformly about the antenna structure in the horizontal plane. The effective intensity shall be reduced to approximately 20,000 candelas at twilight, and to approximately 4,000 candelas at night. The light units shall be mounted in a manner to ensure unobstructed viewing from aircraft at any normal angle of approach, so that the effective intensity of the full beam is not impaired by any structural member of the skeletal framework. The units will normally be adjusted so that the center of the beam is in the horizontal plane.

PARAGRAPH D . , FCC FORM 715-A (MAY 1985):

At the approximate one-third and two-thirds levels of the skeletal tower there shall be installed three or more high intensity light units which conform to FAA/DOD Specification L-856, High Intensity Obstruction Lighting Systems. The complement of units shall emit a white high intensity light and produce an effective intensity of not less than 200,000 candelas (daytime) uniformly about the antenna structure in the horizontal plane. The effective

intensity shall be reduced to approximately 20,000 candelas at twilight, and to approximately 4,000 candelas at night. The light units shall be mounted in a manner to ensure unobstructed viewing from aircraft at any normal angle of approach, so that the effective intensity of the full beam is not impaired by any structural member of the skeletal framework. The normal angular adjustment of the beam centers above the horizontal shall be two degrees at the one-third level and one degree at the two-thirds level.

PARAGRAPH H . , FCC FORM 715-A (MAY 1985):

All lights shall be syncronized to flash simultaneously at 40 pulses per minute. The light system shall be equipped with a light sensitive control device which shall face the north sky and cause the intensity steps to change automatically when the north sky illumination on a vertical surface is as follows:

1. Day to Twilight: Shall not occur before the illumination drops to 60 footcandles, but shall occur before it drops to 30 footcandles.
2. Twilight to Night: Shall not occur before the illumination drops to 5 footcandles, but shall occur before it drops to 2 footcandles.
3. Night to Day: The intensity changes listed in 1. and 2. above shall be reversed in transitioning from the night to day modes.

PARAGRAPH I . , FCC FORM 715-A (MAY 1985):

During construction of an antenna structure for which high intensity lighting is required, at least two lights shall be installed at the uppermost part of the structure. In addition, at each level where permanent obstruction

lighting will be required, two similar lights shall be installed. Each temporary light shall consist of at least 1,500 candelas (peak effective intensity, syncronized to flash simultaneously at 40 pulses per minute. Temporary lights shall be operated continuously, except for periods of actual construction, until the permanent obstruction lights have been installed and placed in operation. Lights shall be positioned to ensure unobstructed viewing from aircraft at any normal angle of approach. If practical, the permanent obstruction lights may be installed at each level as the structure progresses. NOTE: If battery operated, the batteries should be replaced or recharged at regular intervals to preclude failure during operation.

PARAGRAPH B AND D MODIFIED TO REQUIRE A PEAK INTENSITY OF APPROXIMATELY 2,000 CANDELAS AT NIGHT IN LIEU OF 4,000.

Special operating conditions or restrictions:

1. Grant of this authorization is conditioned on the outcome of the digital television (DTV) rule making proceeding in MM Docket No. 87-268. To the extent that the station's Grade B contour or potential for causing interference is extended into new areas by this authorization, the Commission may require the facilities authorized herein to be reduced or modified.

*** END OF AUTHORIZATION ***

Exhibit 2

[SEAL]

Federal Communications Commission
Washington, D.C. 20554

MD-1800E1

TV-49, Inc.
c/o David D. Oxenford, Esquire
Fisher, Wayland, Cooper,
Leader & Zaragoza, LLP
2001 Pennsylvania Ave, NW
Suite 400
Washington, DC 20006

Re: Modification of Facilities
Station WJJA(TV), Racine, WI
BPCT-980328KG

Dear Mr. Oxenford:

This is in reference to the unopposed application filed on behalf of TV-49, Inc., licensee of station WJJA(TV), Racine, Wisconsin, to modify the facilities of the station. You propose to increase the height above average terrain and effective radiated power and to move the station's transmitter to a site that is located 247.3 km away from a vacant allotment at Bloomington, Minnesota. Pursuant to 47 C.F.R. Section 73.610, a minimum separation of 248.6 km is required between WJJA(TV) and a vacant UHF co-channel allotment. Therefore, because your proposal would create a short-spacing of 1.3 km, you have requested a waiver of Section 73.610.

Joel Kinlow, the 99% shareholder of TV-49, Inc., is also the licensee of WGLB(AM) and WGLB-FM, Port Washington,

Wisconsin. Grant of the proposed modification will result in the Grade A contour of WJJA(TV) encompassing all of Port Washington, in violation of 47 C.F.R. Section 73.3555(c), the one-to-a-market rule, which generally prescribes common ownership of television and radio stations in the same market. Consequently, you have also requested waiver of that rule.

ONE-TO-A-MARKET WAIVER REQUEST

The Commission has established standards for reviewing requests for waiver of the one-to-a-market rule. It has adopted a policy under which it looks favorably upon waiver requests involving: (1) station combinations in the top 25 markets where 30 or more independent broadcast voices remain after the proposed transaction; and (2) combinations involving "failed stations." *See Amendment of Section 73.3555, Second Report and Order,* 4 FCC Rcd 1741, *reconsidered in part,* 4 FCC Rcd 6489 (1989). Broadcast stations that have not been operated for a substantial period of time, defined as a minimum of four months, or that are involved in bankruptcy proceedings are considered "failed" within the meaning of the "failed station" criterion. *See* 47 C.F.R. §73.3555, Note 7. Those waiver requests not satisfying either standard will be evaluated on a case-by-case basis to determine if the proposed combination serves the public interest. Our case-by-case review is based on five factors, including: (1) the potential public service benefits; (2) the types of facilities involved; (3) the number of media outlets already owned by the applicant in the relevant market; (4) any financial difficulties involving the station(s); and (5) issues pertaining to the level of diversity and competition within the affected market. *See Second Report and Order,* 4 FCC Rcd at

1753-54. You have submitted a showing using the case-by-case criteria.[1]

Public Service Benefits. Because the television and radio stations are already commonly-owned, you acknowledge that the traditional "dollars and cents" public interest benefits that accrue from combined operations are not applicable here. You contend the principal public interest benefit of the grant of the proposed application will be the "vast technical improvement" in the signal of the station. Station WJJA(TV) will provide Grade B service to an additional 95,778 persons in 5,552 square miles. This additional coverage, you report, is important to make WJJA(TV) "competitive with the other stations in the Milwaukee market." You do, however, point to certain cost saving benefits to result from the expanded coverage. Specifically, you state that "the board operators who man the television station . . . will also be able to monitor the facilities of WGLB-FM, allowing it for the first time to increase its hours of operation to include those hours between 10:00 pm and 6:00 am."

Other Media Outlets/Types of Facilities. Aside from the subject radio and television stations, Mr. Kinlow does not own any broadcast stations or other media interests. With

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[1] Milwaukee is ranked as the 29th television market. Section 202(d) of the Telecommunications Act of 1996 states that "the Commission shall extend its waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity." Pub. 1. No. 104-104, 110 Stat. 56 (1996). However, the Commission has not yet revisited its rules to consider this change. Therefore, the waiver request will be evaluated pursuant to the case-by-case standard.

regard to the types of facilities, WJJA(TV) is a UHF station operating on Channel 48, and currently providing independent and Home Shopping Network programming. Both radio stations have minimal facilities. WGLB(AM) is a 250 watt daytime-only station. WGLB-FM is a 6 kw Class A station operating on Channel 266.

Economic Status. Both of the radio stations owned by Mr. Kinlow have experienced recent financial difficulties. In 1994, Mr. Kinlow purchased the radio stations out of receivership, when the previous station owner was unable to meet its financial obligations. The one other bidder for the stations could not "secure sufficient financing." Prior to being purchased by Mr. Kinlow, the radio stations were operated by the receiver, with minimal funds for reinvestment into programming or expansion of service. Thus, the stations have a history of financial problems. However, you believe the expansion of a commonly-owned television station's coverage area, will "only help to rehabilitate these distressed stations."

Competition and Diversity in the Marketplace. In light of the Commission's concerns regarding diversity and competition, you have provided a showing of the diverse media that exist in the market. Station WJJA(TV) is located in the Milwaukee market, which is ranked as the 29th DMA. According to your engineering exhibit, the Milwaukee market is served by 43 broadcast outlets, consisting of 10 television stations and 33 radio stations, of which at least 30 are separately owned. In addition, there are approximately 45 cable systems and at least 10 daily newspapers serving the market. The proposed modification represents no new media combination, as the stations are already under common ownership. Thus, you maintain that the

proposed application does not change the number of voices, it "merely allows WJJA(TV) to be a more effective competitor in the market." Finally, you state that making this station fully competitive with coverage area of the other stations in the market is "in and of itself a contribution to the diversity of the market."

Discussion. In evaluating a request for waiver of the one-to-a-market rule, the Commission's goal is "to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved." *See Second Report and Order Recon.*, 4 FCC Rcd at 6491. We conclude that your showing in support of a waiver of the one-to-a-market rule is consistent with the public interest and would not have an adverse affect on diversity and competition in the Milwaukee market. We believe the proposed modification and joint operation will benefit these stations, which have a history of financial difficulty. The proposed modification will improve the technical facilities of WJJA(TV) and allow for coverage to be provided to an additional 95,778 persons in 5,552 square miles. In addition to expanded coverage, the stations will achieve increased hours of operation due to the joint operation of a more extensive engineering and accounting staff. As to the types of facilities, the stations are not so powerful as to present any concerns regarding "diversity or competition from too powerful a combination." *Kelso Partners IV, L.P.*, DA 96-1193 (Mass Media Bureau, July 26, 1996). Moreover, you have also demonstrated that the proposed combination will not create any undue concentration of ownership or control of the

broadcast media since there are numerous broadcast stations and other media outlets in the Milwaukee market. Thus, based upon the above, we are persuaded that your request for waiver of the Commission's one-to-a-market rule is in the public interest.

SHORT-SPACING WAIVER REQUEST

As stated above, you have requested a waiver of 47 C.F.R. Section 73.610 because the proposed modification of facilities of WJJA(TV) would create a short-spacing of 1.3 km. In support of that request, you indicate that WJJA(TV)'s current antenna height is approximately 500 feet lower than the other stations in the market and that WJJA(TV) is precluded from increasing the height of its supporting tower due to FAA restrictions. Therefore, you contend that without the ability to increase the height of the tower, you are unable to effectively compete in the market, which renders your current site unsuitable. You note that the short-spacing here is *de minimis* (less than one mile), *see Williams County Broadcasting System, Inc.*, 27 RR 2d 158 (1973), and that there is adequate area for any potential applicant for the Bloomington allocation to locate a fully-spaced transmitter site. Further, the Commission's concerns regarding aeronautical and environmental issues are alleviated because the proposed site is an already existing tower. Thus, based on the representations herein, we find that your request for waiver of the Commission's minimum mileage separation rule is in the public interest.

We find that the applicant is fully qualified and that grant of the application will serve the public interest. Accordingly, **IT IS ORDERED** that the request of TV-49, Inc. for

waiver of the one-to-a-market rule. 47 C.F.R. Section 73.3555(c), to permit common ownership of WJJA(TV), Racine, Wisconsin, WGLB(AM) and WGLB-FM, Port Washington, Wisconsin **IS GRANTED. IT IS FURTHER ORDERED** that the request for waiver of the minimum mileage separation rule, 47 C.F.R. 73.610, **IS GRANTED. IT IS FURTHER ORDERED** that the application for modification of facilities of WJJA(TV), BPCT-960328KG, **IS GRANTED.**

Sincerely,

/s/ James J. Brown
for Barbara A. Kreisman
Chief, Video Services
Division
Mass Media Bureau

cc: Joel Kinlow

[LOGO] PAUL J. FORD AND COMPANY
STRUCTURAL ENGINEERS
250 East Broad Street, Suite 500 •
Columbus, Ohio 43215

April 4, 1997

Plan Examiners Office
10th Floor Municipal Building
841 North Broadway
Milwaukee, WI 53202

Attn: Al Dzierzak

Re: 1053 Ft. Self-supporting Tower
Milwaukee, Wisconsin
(PJF Job No. 297 97-05)

Dear Mr. Dzierzak:

The structural engineering services provided for the above-mentioned tower will be a cooperative effort of two structural engineering companies with extensive experience in communication tower design. Paul J. Ford and Company has produced the tower design drawings and calculations. This permit package has been submitted to you with Kevin Bauman's Wisconsin Professional Engineers seal. All of this material was produced in our office under Mr. Bauman's direct supervision.

The design of the connections and the tower fabrication drawings will be produced by Weisman Consultant Inc. of Downsview, Ontario. Simon Weisman is a registered professional engineer, but is not registered in Wisconsin.

We understand that DILHR requires construction phase site visits by a professional engineer or architect registered in the state of Wisconsin. This service will be performed by Kevin P. Bauman of Paul J. Ford and Company.

If you have any questions or require any additional information please call Kevin Bauman at (614) -221-6679 extension 112.

Sincerely,

PAUL J. FORD AND COMPANY

/s/ Edward W. Kroskie
Edward Kroskie P.E.
President

Exhibit 3

COLUMBUS, OHIO •
614 221-6679
FAX 614-221-2540

ATLANTA, GEORGIA •
404-266-2407
FAX 404-262-3830

ORLANDO, FLORIDA
407-898-9039
FAX 407-897-3662

City of Milwaukee

Office Of The City Clerk
200 E. Wells Street
Milwaukee, Wisconsin

Certified Copy of Resolution

FILE NO: 961537

Substitute resolution approving a "Transmission Tower Policy Statement" as part of the comprehensive plan of the City of Milwaukee.

Whereas, The Common Council of the City of Milwaukee on February 28, 1978 adopted a Preservation Policy which authorizes the preparation of a comprehensive plan; and

Whereas, A citywide policy for transmission towers is one element of the comprehensive plan; and

Whereas, The City of Milwaukee recognizes its obligation to accommodate the radio wave transmission infrastructure systems necessary for a thriving economy and for the personal convenience of Milwaukee residents and visitors; and

Whereas, Such transmission infrastructure systems must, however, be carefully planned and regulated so that economic vitality and personal convenience do not come at the expense of neighborhood stability and urban aesthetics; and

Whereas, Current telecommunications technology allows for the placement of multiple reception/transmission systems on a single transmission tower; and

Whereas, The current rapid proliferation of transmission towers, particularly those used for cellular telephone services and personal communications systems, makes it imperative that the City adopt a policy regarding the placement of such towers which protects Milwaukee residents and neighborhoods without imposing unreasonable burdens on the owners, operators and users of such facilities; and

Whereas, A formally adopted policy on the placement of transmission towers can serve as a reference tool and guide for the Board of Zoning Appeals, the City Plan Commission, City building and zoning staff, and other City bodies and officials responsible for making decisions about the placement of transmission towers in the City of Milwaukee; and

Whereas, On February 17, 1997, the City Plan Commission recommended approval of a Transmission Tower Policy Statement for the City of Milwaukee; now, therefore, be it

Resolved, By the Common Council of the City of Milwaukee, that the Common Council adopts the following Transmission Tower Policy Statement, which, on February 17, 1997, the City Plan Commission recommended for approval:

INTRODUCTION

This policy has been developed through the joint efforts of elected officials, the Plan Commission and staff from various City of Milwaukee departments. The policy is

designed to establish city-wide goals, policies and objectives applicable to transmission towers as a major land use within the City of Milwaukee. The policy is also designed to be general in nature in order to accommodate rapidly advancing technology in the area of communications.

THE PLANNING CONTEXT: The Comprehensive Plan

This policy is one component of Milwaukee's Comprehensive Plan. The Comprehensive Plan is a guide for all City planning, programming, and budgeting decisions.

In February, 1978, the Common Council established an overall policy of preservation, which is the initial component of the Comprehensive Plan. The Preservation Policy emphasizes that Milwaukee must concentrate on preserving its current share of the region's population, housing, employment, services, and tax base. The Preservation Policy is the overall City strategy used in preparing the Comprehensive Plan's other three components, which are increasingly specific in scope. There is a citywide component, a component for subareas of the city, and a component for individual neighborhoods, where appropriate. Each component defines goals, policies, and objectives for major land use activities in the city, like housing and transportation. This policy is the citywide component for transmission towers.

The comprehensive planning process for transmission towers, as well as for other land use activities in the city, is to continuously evaluate city trends and to formulate and implement consistent and realistic goals, policies, objectives, and programs. The steps of the process are:

1. Monitor and report on citywide and subarea trends;

2. Discuss trends with officials and citizens in the context of their philosophy on what the city can and should be and the range of realistic, available options;

3. Establish goals, policies, and objectives;

4. Establish strategies, programs, and budgets to achieve goals, policies, and objectives; and

5. Evaluate progress toward goals.

The first three steps establish the goals and policies the City wishes to achieve. The fourth step establishes an implementation plan – how the goals and policies can be achieved. The final step monitors the results of the implementation of the policy.

TRANSMISSION TOWER POLICY STATEMENT

It is the policy of the City of Milwaukee to accommodate the radio wave infrastructure systems necessary for a thriving economy and for the personal convenience of its citizens and visitors. These infrastructure systems must, however, be carefully planned and regulated so that economic vitality and personal convenience do not come at the expense of neighborhood stability and urban aesthetics. The provisions of this policy, when implemented, should provide an opportunity for tower proponents, affected neighbors and other interested citizens to share information and to participate in an open decision making process. The policy statements which follow, along with public testimony and other case-specific information, will inform the basis for future decision-making by the City.

This policy statement has been prepared in recognition of extensive state and federal regulation of communications and transmission towers. Future City regulation of transmission towers must be consistent with all applicable state and federal statutes, orders, rules and regulations governing the communications field generally and the construction or operation of transmission towers.

Transmission towers generally come in two varieties – those that support TV and radio reception/transmission systems ("RTS"), and those that support personal communications systems, cellular communications facilities, personal wireless services and similar facilities ("PWS"). The former are usually very tall (often over 1000 feet in height) and relatively few in number. The latter are relatively short (100 - 200 feet in height) but are becoming quite numerous. The policy statements apply to either or both tower types as noted.

General design standards should be applicable to all transmission towers, both RTS towers and PWS towers. Tower design should be as advanced as technologically feasible and take into consideration the individual site characteristics and the proximity of other buildings/uses. Plans should include at-grade screening of equipment, storage buildings, and structural support elements. Access drives should be paved. Towers should not be illuminated except as required by FAA or other applicable standards. The base of any freestanding tower should be setback from property lines a distance equal to at least 25% of the tower height when abutting properties have buildings which contains one or more dwelling units and/or buildings for which an occupancy permit is required. When such buildings are within 1,000 linear

feet of a proposed transmission tower, proponents should be required to make extra efforts to be "good neighbors" by minimizing potential adverse impacts. Proponents should indicate in their application materials the steps which will be taken to protect nearby properties from adverse impacts. Such steps could include installation of extra landscaping or other types of buffering, provision of informational materials about the construction and operation of the tower and scheduling informational meetings to discuss the tower proposal.

Transmission towers which exceed applicable height limitations as established by the City of Milwaukee Zoning Code should be established as special uses and reviewed in light of the following policy statements:

1. Regional Distribution (Applicability: RTS Towers Only). The City recognizes the need to provide for towers necessary to meet the needs of the City and surrounding areas. It is the policy of the City to encourage the placement of such towers within the City in a manner which will serve the public convenience of its citizens. The City should not become the regional repository for all such towers, either as a result of inadequate regional planning or unduly restrictive regulation in other surrounding communities, where such towers do not primarily serve the public convenience of the citizens of the City. Applicants seeking approval of plans for the construction or operation of towers or for modifications which change the character of towers should affirmatively demonstrate the manner in which the proposed tower serves the public convenience.

2. Coordinated Usage (Applicability: Both RTS Towers and PWS Towers). As advances in technology render it feasible to improve overall communications while reducing the total number of transmission towers, it is the policy of the City to strongly encourage the design of such towers to accommodate multiple users in order not only to reduce the proliferation of such towers, but also to secure a reduction in the total number of towers. To the extent that transmission towers can hold multiple reception/transmission ("R/T") systems, tower proponents should be strongly encouraged to make every effort to locate their R/T systems on existing structures. Applicants for new transmission towers should be encouraged to design such facilities to accommodate multiple R/T systems and associated equipment in order to fulfill the City's policy of reducing the total number of towers over time. At a minimum, RTS towers for TV and/or radio facilities should be designed to support at least three R/T systems having similar power. PWS towers should be designed to accommodate as many systems as are feasible. The extent to which proposed towers promote the City's policy of providing for consolidated usage is a factor to be considered in the ultimate determination as to whether such towers meet the public convenience. Any Zoning Code amendments adopted pursuant to this policy should provide specific requirements and criteria for the design of towers in order to contribute to meeting the overall planning objective of coordinated usage.

3. Consolidation (Applicability: RTS Towers Only). Accomplishment of the policy objective providing for coordinated usage of transmission towers should lead to a reduction in the total number of such towers within the

City through consolidation. It is the policy of the City to strongly encourage such consolidation in order not only to reduce potential proliferation of transmission towers, but also to secure a net reduction in the total number of transmission towers. The extent to which a proposed tower promotes the City's policy of consolidation should be taken into consideration in determining whether such transmission towers serve the public convenience at a particular location. Applicants for the approval of new towers who are able to demonstrate that the construction of such new towers will eventually result in the removal of one or more existing towers should be presumptively deemed to have demonstrated that such towers will indeed fulfill the policy objective providing for consolidation of transmission towers.

; and, be it

Further Resolved, That the appropriate City agencies, boards, commissions and staff are hereby directed to be guided by the Transmission Tower Policy Statement in making decisions about the placement of transmission towers in the City of Milwaukee.

[SEAL]

I, Ronald D. Leonhardt, City Clerk, do hereby certify that the foregoing is a true and correct copy of a(n) Resolution passed by the COMMON COUNCIL of the

City of Milwaukee, Wisconsin on March 21, 1997, published on February 3, 1997.

/s/ Ronald D. Leonhardt — April 14, 2000
Ronald D. Leonhardt — Date Certified
City Clerk

[SEAL] **City of Milwaukee**
Text File Report
Ordinance

200 E. Wells Street
Milwaukee, Wisconsin
53202

Introduced: 5/13/97 **File Number:** 970241

Status: Passed **Version:** 4

Sponsors: ALD. D'AMATO

A substitute ordinance relating to zoning regulations for transmission towers.

– Analysis –

This ordinance, which is intended to implement the "Transmitter Tower Policy Statement" adopted by the Milwaukee Common Council (File Number 961537) on March 21, 1997:

1. Changes the building and zoning code term "transmitter tower" to "transmission tower," updates the definition for such a structure to reflect modern communication technology and defines the term "reception/transmission system" (the equipment mounted to a transmission tower and used to emit or receive radio frequency waves).

2. Makes transmission towers a permitted use in the following zoning districts, under the circumstances specified:

a. Multi-family residence (towers in R/A/85 to R/C/125 districts that do not exceed the height limits of such districts).

b. Residential and office (towers that do not exceed the district height limit).

c. Neighborhood shopping (towers that do not exceed the district height limit).

d. Local business (towers that do not exceed the district height limit).

e. Commercial service (towers that do not exceed the district height limit).

f. Regional shopping (towers that do not exceed the district height limit).

g. Central business (generally, towers that do not exceed 150 feet in height).

h. Manufacturing (towers that do not exceed 2 times the district height limit or 150 feet, whichever is less).

i. Industrial (towers that do not exceed 2 times the district height limit or 150 feet, whichever is less).

j. Institutional (towers that do not exceed the district height limit).

3. Makes transmission towers a special use in the following zoning districts, under the circumstances specified:

a. Single-family residence (towers that do not exceed 2 times the district height limit).

b. Two-family residence (towers that do not exceed 2 times the district height limit).

c. Multi-family residence (towers that do not exceed 2 times the district height limit or 150 feet, whichever is less, except towers in R/A/85 to R/C/125 districts that do not exceed the height limits of such districts).

d. Restricted office (towers that do not exceed 2 times the district height limit).

e. Residential and office (towers that exceed the district height limit, but do not exceed 2 times the district height limit or 150 feet, whichever is less).

f. Neighborhood shopping (towers that exceed the district height limit, but do not exceed 2 times the district height limit or 150 feet, whichever is less).

g. Local business (towers that exceed the district height limit, but do not exceed 2 times the district height limit or 150 feet, whichever is less).

h. Commercial service (towers that exceed the district height limit, but do not exceed 2 times the district height limit or 150 feet, whichever is less).

i. Regional shopping (towers that exceed the district height limit, but do not exceed 2 times the district height limit or 150 feet, whichever is less).

j. Central business (generally, towers that exceed 150 feet in height).

k. Manufacturing (towers that exceed 2 times the district height limit or 150 feet, whichever is less).

l. Industrial (towers that exceed 2 times the district height limit or 150 feet, whichever is less).

m. Institutional (towers that exceed the district height limit, but do not exceed 2 times the district height limit or 150 feet, whichever is less).

n. Lakefront (towers that do not exceed the district height limit).

4. Generally classifies transmission towers which are accessory to elementary and secondary schools as permitted uses, regardless of zoning district, whenever such towers do not exceed 2 times the district height limit or 150 feet, whichever is less, and are set back from all property lines a distance at least equal to tower height.

5. Makes transmission towers a prohibited use in all other zoning districts.

6. Eliminates the current provision which makes transmission towers used for government purposes permitted uses regardless of tower height and proximity to residential uses.

7. Requires that transmission towers constructed in zoning districts in which such structures are a permitted use meet requirements relating to screening of equipment, paving of access drives, tower illumination and setbacks on lots adjacent to habitable structures.

8. Requires that transmission towers constructed in zoning districts in which such structures are a special use meet the requirements summarized in #7, as well as requirements relating to technologically-advanced tower design, efforts to mitigate the impacts of towers on nearby habitable structures, provisions for coordinated use of existing and new towers, and, for towers used to transmit television and/or radio signals, evidence that the tower could lead to an ultimate reduction in the number of transmission towers in the city of Milwaukee.

9. Requires removal of transmission towers which have not been used to emit or receive radio frequency waves for a period of at least 12 consecutive months.

10. Allows nonconforming transmission towers which are destroyed or damaged by fire, storm or other casualty to be reconstructed, even if the cost of reconstruction exceeds 50% of the tower's value, as long as the tower owner complies with the requirements for transmission towers classified as special uses and as long as the height of the replacement tower does not exceed the height of the tower that was destroyed or damaged.

11. Exempts towers which are mounted on buildings and have a height of less than 20 feet or 25% of the height of the structure, whichever is less, from all requirements of this ordinance.

This ordinance becomes effective November 1, 1997.

Whereas, The City of Milwaukee recognizes its obligation to accommodate the radio wave transmission infrastructure systems necessary for a thriving economy and for the personal convenience of Milwaukee residents and visitors; and

Whereas, Such transmission infrastructure systems must, however, be carefully planned and regulated so that economic vitality and personal convenience do not come at the expense of neighborhood stability and urban aesthetics; and

Whereas, The current rapid proliferation of transmission towers, particularly those used for cellular telephone service and personal communications systems, makes it imperative that the City enact legislation which regulates such towers in a manner which protects Milwaukee residents and neighborhoods without imposing unreasonable

burdens on the owners, operators and users of such facilities; and

Whereas, On March 21, 1997, the Common Council adopted File Number 961537, a resolution approving a "Transmission Tower Policy Statement" as part of the comprehensive plan of the City of Milwaukee; and

* * *

City of Milwaukee

Office of the City Clerk

200 E. Wells Street
Milwaukee, Wisconsin 53202
Certified Copy of Ordinance

FILE NO: 970241

A substitute ordinance relating to zoning regulations for transmission towers.

Whereas, The City of Milwaukee recognizes its obligation to accommodate the radio wave transmission infrastructure systems necessary for a thriving economy and for the personal convenience of Milwaukee residents and visitors; and

Whereas, Such transmission infrastructure systems must, however, be carefully planned and regulated so that economic vitality and personal convenience do not come at the expense of neighborhood stability and urban aesthetics; and

Whereas, The current rapid proliferation of transmission towers, particularly those used for cellular telephone service and personal communications systems, makes it imperative that the City enact legislation which regulates such towers in a manner which protects Milwaukee residents and neighborhoods without imposing unreasonable burdens on the owners, operators and users of such facilities; and

Whereas, On March 21, 1997, the Common Council adopted File Number 961537, a resolution approving a

"Transmission Tower Policy Statement" as part of the comprehensive plan of the City of Milwaukee; and

Whereas, in order for the adopted "Transmission Tower Policy Statement" to be effective, the City must enact various amendments to its zoning code; now, therefore

The Mayor and Common Council of the City of Milwaukee do ordain as follows:

Part 1. Section 200-33-65-g of the code is amended to read:

200-33. Fees.

65. ZONING BOARD OF APPEALS.

g. [[Transmitter]] >> Transmission << towers: $300.

Part 2. Section 295-7-140.6 of the code is created to read:

295-7. Definitions.

140.6. RECEPTION/TRANSMISSION SYSTEM: A system of electrical conductors that emit or receive radio frequency waves, including antennae, communication dishes and similar devices.

Part 3. Section 295-7-180 of the code is repealed and recreated to read:

180. TRANSMISSION TOWER: A structure designed to support one or more reception/transmission systems. Examples of transmission towers include, but shall not be limited to, radio towers, television towers, telephone exchange/microwave relay towers and cellular telephone transmission/personal communications systems towers.

Part 4. Section 295-14-17 of the code is created to read:

295-14. Special Conditions.

17. TRANSMISSION TOWERS. a. Tower Height. For purposes of enforcing and applying this chapter's provisions relating to transmission towers, the following principles for determining transmission tower height are established:

a-1. For a freestanding transmission tower, the height of such tower shall be the height of the tower above grade, measured at the center of the tower.

a-2. Unless otherwise noted, whenever a transmission tower is mounted to a building or other structure, the height of such tower shall be considered to include both the height of the tower itself plus the height of the building or structure to which the tower is attached, measured at the point of attachment.

a-3. Transmission tower height shall include the height of any reception/transmission systems which extend above the top of the tower.

b. Towers or Reception/Transmission Systems Mounted to Buildings as Permitted Uses. Notwithstanding any other provisions of this code, any transmission tower or reception/transmission system which is mounted to a building or other structure and has a height less than 20 feet or 25% of the height of the building or structure, whichever is less, shall be a permitted use, but shall not be subject to the requirements of par. c. In this paragraph, transmission tower or reception/transmission system height shall not include the height of the building or structure to which the tower or system is attached.

c. Requirements for Transmission Towers Which Are Permitted Uses. Whenever a transmission tower is a permitted use, the owner or developer of the tower shall submit, to the department, plans and other permit application materials which demonstrate that the facility will comply with the following requirements:

c-1. Ground-level equipment, storage buildings and structural support elements shall be screened by a landscaped buffer which completely surrounds such equipment or structures, except for necessary openings for sidewalks or driveways that provide access to the equipment or structures. The buffer shall be located no farther than 5 feet from the equipment or structures, measured at the nearest point of the buffer to the equipment or structures. The buffer shall be at least 5 feet deep and shall be landscaped with a combination of shrubs, trees and ground cover, as provided in s. 295-14-12-b.

c-2. Access drives shall be paved.

c-3. The tower shall not be illuminated except as required by the federal aviation administration or other applicable standards.

c-4. If the tower is freestanding and any abutting property contains one or more dwelling units or a structure for which an occupancy certificate is required, the base of the tower shall be set back from the property lines of such abutting property a distance of at least 25% of the tower's height.

c-5. No structure other than related accessory structures may be located in an area 20 feet on each side of the

radial line between the center of the transmission tower and each guy anchorage.

c-6. No tower guy anchor or approved enclosure for the same may be located closer than 30 feet to any lot line, street line or street line extended if the abutting property contains one or more dwelling units or a structure for which an occupancy certificate is required.

d. Requirements for Transmission Towers Which Are Special Uses. Whenever a transmission tower is a special use, the owner or developer of the tower shall submit, to the department and to the board, plans and other permit application materials which demonstrate that the facility will comply with the requirements of par. c, will serve the public convenience of residents of the city and will be consistent with the following:

d-1. The tower's design shall be as advanced as technologically feasible, and appropriate for individual site characteristics and proximity to other buildings and uses.

d-2. If the tower will be located within 1000 linear feet of any dwelling unit or any structure for which an occupancy certificate is required, the tower owner or developer shall take whatever steps the board finds necessary to protect such dwelling units and structures from undesirable impacts of the tower. Such steps may include installation of landscaping or buffering beyond what is required by par. c-1, provision of informational materials about the construction and operation of the tower, and scheduling of informational meetings with owners and residents of abutting properties to discuss the tower proposal.

d-3. The transmission tower owner or developer shall provide a written statement that the owner or developer has made every reasonable effort to locate reception/transmission systems on existing structures. This statement shall be accompanied by documentation which demonstrates that such efforts have been made.

d-4. When a new transmission tower is erected, it shall be designed to accommodate multiple reception/transmission systems and related equipment. The extent to which the proposed tower will promote coordinated tower usage shall be a factor used by the board in determining whether the tower is necessary to serve the public convenience at a particular location, as required by s. 295-59-5-b-1. The minimum requirements for accommodating multiple reception/transmission systems shall be as follows:

d-4-a. A tower for television and/or radio facilities shall be designed to support at least 3 additional reception/transmission systems having power equal to or greater than that of the reception/transmission system which the tower is initially built to support.

d-4-b. For any other transmission tower other than a tower for television and/or radio facilities, the total number of reception/transmission systems the tower shall be designed to accommodate shall be as follows:

Number of Tower Height Reception/Transmission Systems

0-50 feet 1 51-100 feet 2 151-250 feet 4 251-350 feet 6 over 350 feet 6 plus 2 for each 100 feet or fraction thereof over 350 feet

Note: For purposes of determining compliance with this requirement, the height of the transmission tower shall be the height of the transmission tower itself, not the combined height of the tower and any building or structure to which it may be mounted.

d-5. In addition to presenting a tower design which can accommodate multiple reception/transmission systems and related equipment, as required by par. d-4, the tower owner or developer shall provide a statement indicating that the owner or developer will, on a nondiscriminatory basis, make the space provided for multiple reception/transmission systems available to other tower users. To the extent not precluded by physical, mechanical or regulatory limitations, the tower owner or developer shall allow for co-location of reception/transmission systems on the tower at fair market rental rates. The statement may be accompanied by supporting documentation which describes the tower owner or developer's record of making space on the owner or developer's other towers available to other users.

d-6. If the tower will be used for the transmission of television and/or radio signals, the tower owner or developer shall provide evidence that construction of the tower may ultimately lead to a net reduction in the total number of transmission towers in the city. The extent to which the proposed tower may lead to an ultimate reduction in the number of transmission towers in the city shall be a factor used by the board in determining whether the tower is necessary to serve the public convenience at a particular location, as required by s. 295-59-5-b.1.

e. Abandoned Towers. Whenever any transmission tower has ceased to be used for the emission or reception of radio frequency waves for a period of 12 consecutive months, such tower shall be considered abandoned. An abandoned transmission tower shall be removed within 90 days of the end of such 12-month period. Any discontinuance of transmission tower use caused by governmental action and without any contributing fault by the tower user whose use of the tower was discontinued shall not be considered in calculating the length of discontinuance.

f. Reconstruction of Nonconforming Towers. Notwithstanding the provisions of subch. 3, a nonconforming transmission tower which is destroyed or damaged by fire, storm or other casualty, to the extent that the cost of reconstruction exceeds 50% of the tower's market value at the time of such loss, may be reconstructed provided that the tower owner complies with all applicable requirements for transmission towers classified as special uses, as specified in par. d, and provided that the height of the new tower does not exceed the height of the tower that was destroyed or damaged.

Part 5. Section 295-15-1-e of the code is amended to read:

295-15. Height Limitations. 1. BY DISTRICT.

e. Monuments, [[transmitter towers,]] television antennae, radio antennae, flag poles, spires, church roofs, domes, cupolas, or belfries for ornamental purposes and not used for human occupancy.

Part 6. Section 295-15-1-f of the code is created to read:

f. Transmission towers, whenever transmission towers that exceed the district height limitation are a permitted use or a special use in the relevant zoning district. Such towers may exceed the district height limitation only to the extent specified in the district use regulations.

Part 7. Section 295-19-8 of the code is repealed. (Note: The provisions being repealed read as follows:

295-19. Area and Placement Regulations.

8. Transmitter towers and related accessory structures must be constructed in compliance with the following:

a. No structure other than related accessory structures shall be located within a circle having the transmitter tower as its center and a radius equal to 20% of the height of the tower or 100 feet, whichever is greater.

b. No structure other than related accessory structures shall be located in an area 20 feet on each side of the radial line between the center of the transmitter tower and each guy anchorage.

c. No tower guy anchor and approved enclosure for the same shall be located closer than 30 feet to any lot line, street line or street line extended if the adjacent lot or parcel is used or zoned for residence purposes.)

Part 8. Section 295-112-3-d of the code is repealed and recreated to read:

295-112. Permitted Uses.

3. CHURCHES AND SCHOOLS.

d. Transmission towers accessory to elementary and secondary schools, subject to s. 295-14-17-c and provided that any such tower does not exceed 2 times the district height limit and is set back from all property lines a distance at least equal to the height of the tower.

Part 9. Section 295-112-4-a of the code is amended to read:

4. PUBLIC AND QUASI-PUBLIC.

a. Governmental structures, [[including transmitter]] >> excluding transmission << towers, not detrimental to the character of the district.

Part 10, Section 295-113-4-b of the code is repealed and recreated to read:

295-113. Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

b. Transmission towers that do not exceed 2 times the district height limit, subject to s. 295-14-17-d, except towers permitted under s. 295-112-3-d.

Part 11. Section 295-122-3-d of the code is repealed and recreated to read:

295-122. Permitted Uses.

3. CHURCHES AND SCHOOLS.

d. Transmission towers accessory to elementary and secondary schools, subject to s. 295-14-17-c and provided that any such tower does not exceed 2 times the district height limit and is set back from all property lines a distance at least equal to the height of the tower.

Part 12. Section 295-122-4-a of the code is amended to read:

4. PUBLIC AND QUASI-PUBLIC.

a. Governmental structures, [[including transmitter]] >> excluding transmission << towers, not detrimental to the character of the district.

Part 13. Section 295-123-4-b of the code is repealed and recreated to read:

295-123. Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

b. Transmission towers that do not exceed 2 times the district height limit, subject to s. 295-14-17-d, except towers permitted under s. 295-122-3-d.

Part 14. Section 295-132-3-d of the code is repealed and recreated to read:

295-132. Permitted Uses.

3. CHURCHES AND SCHOOLS.

d. Transmission towers accessory to elementary and secondary schools, subject to s. 295-14-17-c and provided that any such tower does not exceed 2 times the district height limit or 150 feet, whichever is less, and is set back from all property lines a distance at least equal to the height of the tower.

Part 15. Section 295-132-4-a of the code is amended to read:

4. PUBLIC AND QUASI-PUBLIC.

a. Governmental structures, [[including transmitter]] >> excluding transmission << towers, not detrimental to the character of the district.

Part 16. Section 295-132-4-f of the code is created to read:

f. in R/A/85 to R/C/125 districts, transmission towers that do not exceed the district height limit, subject to s. 295-14-17-c.

Part 17. Section 295-133-4-c of the code is repealed and recreated to read:

295-133. Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

c. Transmission towers that do not exceed 2 times the district height limit or 150 feet, whichever is less, subject to s. 295-14-17-d, except towers permitted under s. 295-132-3-d and 4-f.

Part 18. Section 295-213-4-b of the code is repealed and recreated to read:

295-213. Special Uses.

4. Transmission towers that do not exceed 2 times the district height limit, subject to s. 295-14-17-d.

Part 19. Section 295-222-3-d of the code is repealed and recreated to read:

295-222. Permitted Uses.

3. CHURCHES AND SCHOOLS.

d. Transmission towers accessory to elementary and secondary schools, subject to s. 295-14-17-c and provided

that any such tower does not exceed 2 times the district height limit or 150 feet, whichever is less, and is set back from all property lines a distance at least equal to the height of the tower.

Part 20. Section 295-222-4-d of the code is repealed and recreated to read:

4. PUBLIC AND QUASI-PUBLIC.

d. Transmission towers that do not exceed the district height limit, subject to s. 295-14-17-c.

Part 21. Section 295-223-4-b of the code is repealed and recreated to read:

295-223. Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

b. Transmission towers that do not exceed 2 times the district height limit or 150 feet, whichever is less, subject to s. 295-14-17-d, except towers permitted under s. 295-222-3-d and 4-d.

Part 22. Section 295-312-3-c of the code is repealed and recreated to read:

295-312. Permitted Uses.

3. CHURCHES AND SCHOOLS.

c. Transmission towers accessory to elementary and secondary schools, subject to s. 295-14-17-c and provided that any such tower does not exceed 2 times the district height limit or 150 feet, whichever is less, and is set back from all property lines a distance at least equal to the height of the tower.

Part 23. Section 295-312-4-a of the code is amended to read:

4. PUBLIC AND QUASI-PUBLIC.

a. Governmental structures, [[including transmitter]] >> excluding transmission<< towers, not detrimental to the character of the district.

Part 24. Section 295-312-4-e of the code is repealed and recreated to read:

e. Transmission towers that do not exceed the district height limit, subject to s. 295-14-17-c.

Part 25. Section 295-313-4-b of the code is repealed and recreated to read:

295-313. Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

b. Transmission towers that do not exceed 2 times the district height limit or 150 feet, whichever is less, subject to s. 295-14-17-d, except towers permitted under s. 295-312-3-c and 4-e.

Part 26. Section 295-322-3-d of the code is repealed and recreated to read:

295-322. Permitted Uses.

3. CHURCHES AND SCHOOLS.

d. Transmission towers accessory to elementary and secondary schools, subject to s. 295-14-17-c and provided that any such tower does not exceed 2 times the district height limit or 150 feet, whichever is less, and is set back from all property lines a distance at least equal to the height of the tower.

Part 27. Section 295-322-4-a of the code is amended to read:

4. PUBLIC AND QUASI-PUBLIC.

a. Governmental structures, [[including transmitter]] >>excluding transmission<< towers, not detrimental to the character of the district.

Part 28. Section 295-322-4-e of the code is repealed and recreated to read:

e. Transmission towers that do not exceed the district height limit, subject to s. 295-14-17-c.

Part 29. Section 295-323-4-b of the code is repealed and recreated to read:

295-323. Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

b. Transmission towers that do not exceed 2 times the district height limit or 150 feet, whichever is less, subject to s. 295-14-17-d, except towers permitted under s. 295-322-3-d and 4-e.

Part 30. Section 295-332-3-e of the code is repealed and recreated to read:

295-332. Permitted Uses.

3. CHURCHES AND SCHOOLS.

e. Transmission towers accessory to elementary and secondary schools, subject to s. 295-14-17-c and provided that any such tower does not exceed 2 times the district height limit or 150 feet, whichever is less, and is set back from all property lines a distance at least equal to the height of the tower.

Part 31. Section 295-332-4-f of the code is repealed and recreated to read:

4. PUBLIC AND QUASI-PUBLIC.

f. Transmission towers that do not exceed the district height limit, subject to s. 295-14-17-c.

Part 32. Section 295-333-4 of the code is repealed and recreated to read:

295-333. Special Uses.

4. PUBLIC AND QUASI-PUBLIC. Transmission towers that do not exceed 2 times the district height limit or 150 feet, whichever is less, subject to s. 295-14- 17-d, except towers permitted under s. 295-332-3-e and 4-f.

Part 33. Section 295-342-3-e of the code is repealed and recreated to read:

295-342. Permitted Uses.

3. CHURCHES AND SCHOOLS.

e. Transmission towers accessory to elementary and secondary schools, subject to s. 295-14-17-c and provided that any such tower does not exceed 2 times the district height limit or 150 feet, whichever is less, and is set back from all property lines a distance at least equal to the height of the tower.

Part 34. Section 295-342-4-a of the code is amended to read:

4. PUBLIC AND QUASI-PUBLIC.

a. Governmental structures, [[including transmitter]] >>excluding transmission<< towers, not detrimental to the character of the district.

Part. 35. Section 295-342-4-e of the code is repealed and recreated to read:

e. Transmission towers that do not exceed the district height limit, subject to s. 295-14-17-c.

Part 36. Section 295-343-4 of the code is repealed and recreated to read:

295-343. Special Uses.

4. PUBLIC AND QUASI-PUBLIC. Transmission towers that do not exceed 2 times the district height limit or 150 feet, whichever is less, subject to s. 295-14- 17-d, except towers permitted under s. 295-342-3-e and 4-e.

Part 37. Section 295-412-3-c of the code is repealed and recreated to read:

295-412. C9A (High Density Residential): Permitted Uses.

3. CHURCHES AND SCHOOLS.

c. Transmission towers accessory to elementary and secondary schools, subject to s. 295-14-17-c and provided that any such tower is set back from all property lines a distance at least equal to the height of the tower and, if located in subdistrict B, does not exceed 2 times the district height limit.

Part 38. Section 295-412-4-c of the code is repealed and recreated to read:

4. PUBLIC AND QUASI-PUBLIC.

c. In subdistrict A, transmission towers that do not exceed 150 feet in height, subject to s. 295-14- 17-c.

Part 39. Section 295-413-4-d of the code is repealed and recreated to read:

295-413. C9A (High Density Residential): Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

d. Transmission towers, subject to s. 295-14-17-d, except towers permitted under s. 295-412-3-c and 4-c or, in sub-district B, towers that exceed 2 times the district height limit.

Part 40. Section 295-422-3-c of the code is repealed and recreated to read:

295-422. C9B (Residential and Specialty Use): Permitted Uses.

3. CHURCHES AND SCHOOLS.

c. Transmission towers accessory to elementary and secondary schools, subject to s. 295-14-17-c and provided that any such tower is set back from all property lines a distance at least equal to the height of the tower.

Part 41. Section 295-422-4-d of the code is repealed and recreated to read:

4. PUBLIC AND QUASI-PUBLIC.

d. Transmission towers that do not exceed 150 feet in height, subject to s. 295-14-17-c.

Part 42. Section 295-423-4-b of the code is repealed and recreated to read:

295-423. C9B (Residential and Specialty Use): Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

b. Transmission towers, subject to s. 295-14-17-d, except towers permitted under s. 295-422-3-c and 4-d.

Part 43. Section 295-432-3-c of the code is repealed and recreated to read:

295-432. C9C (Neighborhood Retail): Permitted Uses.

3. CHURCHES AND SCHOOLS.

c. Transmission towers accessory to elementary and secondary schools, subject to s. 295-14-17-c and provided that any such tower is set back from all property lines a distance at least equal to the height of the tower.

Part 44. Section 295-432-4-d of the code is repealed and recreated to read:

4. PUBLIC AND QUASI-PUBLIC.

d. Transmission towers that do not exceed 150 feet in height, subject to s. 295-14-17-c.

Part 45. Section 295-433-4-b of the code is repealed and recreated to read:

295-433. C9C (Neighborhood Retail): Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

b. Transmission towers, subject to s. 295-14-17-d, except towers permitted under s. 295-432-3-c and 4-d.

Part 46. Section 295-442-3-d of the code is repealed and recreated to read:

295-442. C9D (Civic Activity): Permitted Uses.

3. CHURCHES AND SCHOOLS.

d. Transmission towers accessory to elementary and secondary schools, subject to s. 295-14-17-c and provided that any such tower is set back from all property lines a distance at least equal to the height of the tower.

Part 47. Section 295-442-4-d of the code is repealed and recreated to read:

4. PUBLIC AND QUASI-PUBLIC.

d. Transmission towers that do not exceed 150 feet in height, subject to s. 295-14-17-c.

Part 48. Section 295-443-4-b of the code is repealed and recreated to read:

295-443. C9D (Civic Activity): Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

b. Transmission towers, subject to s. 295-14-17-d, except towers permitted under s. 295-442-3-d and 4-d.

Part 49. Section 295-452-4-d of the code is repealed and recreated to read:

295-452. C9E (Major Retail): Permitted Uses.

4. PUBLIC AND QUASI-PUBLIC.

d. Transmission towers that do not exceed 150 feet in height, subject to s. 295-14-17-c.

Part 50. Section 295-453-4-c of the code is repealed and recreated to read:

295-453. C9E (Major Retail): Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

c. Transmission towers, subject to s. 295-14-17-d, except towers permitted under s. 295-452-4-d.

Part 51. Section 295-462-3-c of the code is repealed and recreated to read:

295-462. C9F (Office and Service): Permitted Uses.

3. CHURCHES AND SCHOOLS.

c. Transmission towers accessory to elementary and secondary schools, subject to s. 295-14-17-c and provided that any such tower is set back from all property lines a distance at least equal to the height of the tower and, if located in subdistrict C, does not exceed 2 times the district height limit.

Part 52. Section 295-462-4-d of the code is repealed and recreated to read:

4. PUBLIC AND QUASI-PUBLIC.

d. In subdistricts A and B, transmission towers that do not exceed 150 feet in height, subject to s. 295-14-17-c.

Part 53. Section 295-463-4-b of the code is repealed and recreated to read:

295-463. C9F (Office and Service): Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

b. Transmission towers, subject to s. 295-14-17-d, except towers permitted under s. 295-462-3-c and 4-d or, in subdistrict C, towers that exceed 2 times the district height limit.

Part 54. Section 295-472-3-b of the code is repealed and recreated to read:

295-472. C9G (Mixed Activity): Permitted Uses.

3. CHURCHES AND SCHOOLS.

b. Transmission towers accessory to elementary and secondary schools, subject to s. 295-14-17-c and provided

that any such tower is set back from all property lines a distance at least equal to the height of the tower.

Part 55. Section 295-472-4-d of the code is repealed and recreated to read:

4. PUBLIC AND QUASI-PUBLIC.

d. Transmission towers that do not exceed 150 feet in height, subject to s. 295-14-17-c.

Part 56. Section 295-473-4-b of the code is repealed and recreated to read:

295-473. C9G (Mixed Activity): Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

b. Transmission towers, subject to s. 295-14-17-d, except towers permitted under s. 295-472-3-b and 4-d.

Part 57. Section 295-482-4-c of the code is repealed and recreated to read:

295-482. C9H (Warehousing and Light Manufacturing): Permitted Uses.

4. PUBLIC AND QUASI-PUBLIC.

c. Transmission towers that do not exceed 150 feet in height, subject to s. 295-14-17-c.

Part 58. Section 295-483-4-b of the code is repealed and recreated to read:

295-483. C9H (Warehousing and Light Manufacturing): Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

b. Transmission towers, subject to s. 295-14-17-d, except towers permitted under s. 295-482-4-c.

Part 59. Section 295-512-4-d of the code is repealed and recreated to read:

295-512. Permitted Uses.

4. PUBLIC AND QUASI-PUBLIC.

d. Transmission towers that do not exceed 2 times the district height limit or 150 feet, whichever is less, subject to s. 295-14-17-c.

Part 60. Section 295-513-4-f of the code is repealed and recreated to read:

295-513. Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

f. Transmission towers, subject to s. 295-14-17-d, except towers permitted under s. 295-512-4-d.

Part 61. Section 295-522-4-i of the code is repealed and recreated to read:

295-522. Permitted Uses.

4. PUBLIC AND QUASI-PUBLIC.

i. Transmission towers that do not exceed 2 times the district height limit or 150 feet, whichever is less, subject to s. 295-14-17-c.

Part 62. Section 295-523-4-f of the code is repealed and recreated to read:

295-523. Special Uses.

4. PUBLIC AND QUASI-PUBLIC.

f. Transmission towers, subject to s. 295-14-17-d, except towers permitted under s. 295-522-4-i.

Part 63. Section 295-622-3-d of the code is repealed and recreated to read:

295-622. Permitted Uses.

3. CHURCHES AND SCHOOLS.

d. Transmission towers accessory to elementary and secondary schools, subject to s. 295-14-17-c and provided that any such tower does not exceed 2 times the district height limit or 150 feet, whichever is less, and is set back from all property lines a distance at least equal to the height of the tower.

Part 64. Section 295-622-4-e of the code is repealed and recreated to read:

4. PUBLIC AND QUASI-PUBLIC.

e. Transmission towers that do not exceed the district height limit, subject to s. 295-14-17-c.

Part 65. Section 295-623-4 of the code is repealed and recreated to read:

295-623. Special Uses.

4. PUBLIC AND QUASI-PUBLIC. Transmission towers that do not exceed 2 times the district height limit or 150

feet, whichever is less, subject to 295-14-17-d, except towers permitted under s. 295-622-3-d and 4-e.

Part 66. Section 295-652-4-e of the code is amended to read:

295-652. Permitted Uses.

4. PUBLIC AND QUASI-PUBLIC.

e. Government facilities, but not >>transmission towers,<< jails, prisons or other penal institutions.

Part 67. Section 295-653-4 of the code is repealed and recreated to read:

295-653. Special Uses.

4. PUBLIC AND QUASI-PUBLIC. Transmission towers that do not exceed the district height limit, subject to s. 295-14-17-d.

Part 68. This ordinance shall be effective November 1, 1997.

[SEAL]

I, Ronald D. Leonhardt, City Clerk, do hereby certify that the foregoing is a true and correct copy of a(n) Ordinance passed by the COMMON COUNCIL of the City of Milwaukee, Wisconsin on July 25, 1997, published on June 16, 1997, effective November 1, 1997.

/s/ Ronald D. Leonhardt — **May 24, 2001**

Ronald D. Leonhardt — **Date Certified**

City Clerk

CITY OF MILWAUKEE
BOARD OF ZONING APPEALS

In the Matter of:

3872 North Fratney Street Case No. 21011

COMMITTEE MEMBERS

EINAR H. TANGEN – Chairman
RONALD E. PLEVA
HENRY P. SZYMANSKI
CRAIG ZETLEY
ROSEMARY FRUNCEK, Secretary

BUILDING INSPECTION by SUZANNE MISOVIE
PLAN ADMINISTRATION by EDWARD RICHARDSON

Proceedings had and testimony given in the above-entitled matter before the BOARD OF ZONING APPEALS OF THE CITY OF MILWAUKEE on the 31st day of July, 1997, before Laurell L. Breslow of Milwaukee Reporters Associated, Inc.

* * *

[6] from an apartment building, and there are other apartment buildings nearby. And given the fact when you start construction, it's just oh so easy to, you know, misplace your placement by so much and actually be less than 150 feet away from it. We believe the only reason that he did locate kind of as he did was to avoid that special use request.

I should note that earlier this year the City of Milwaukee Common Council passed an ordinance that sets a tower policy. The purpose of the tower policy, it is a part

of the City's comprehensive plan, and it is designed to be used as a tool to evaluate tower requests by the City Planning Commission, the Board of Zoning Appeals and the Common Council. One of the – Since that time the Common Council has passed some direct zoning ordinances regarding towers. This particular case is exempt from that, although I think, you know, some of the issues addressed by that are important. One of the goals of the tower –

MR. ZETLEY: Why is it exempt from it?

MR. RICHARDSON: This case was filed before the new ordinance took effect.

MR. ZETLEY: Okay.

MR. RICHARDSON: The policy ordinance is [7] in effect and relevant. There are some specific criteria that were passed I believe last week that are not – well, that takes effect in November.

Among the goals that were passed and are part of the city ordinances is that towers should be designed to accommodate more than one user. Towers – The goal is to reduce the number of towers in the city. Towers should be aesthetic, and landscaping should be done to provide for them. Towers serve the Milwaukee region and therefore should not be concentrated in the city, and we have an entire range of areas.

This tower does not do any of those sorts of things. We believe that the appellant can be accommodated. Channel 58 has built their tower to accomodate more than one antenna, and we believe the appellant has the opportunity to use facilities such as that.

I should also note that this board has quite a bit of experience in dealing with reviewing towers in regard to the Channel 58 tower, and one of the issues that was raised by residents in that tower, and that tower was 500 feet, at least 500, probably 600 feet away from the nearest residence, and it was only slightly taller than this. And one

* * *

[19] none of them being within 200 feet of the actual tower site. Now, the abutting neighbors to the north and south of this property, we have not had any objection from.

The – When we take a look at the aesthetic value or difficulties with property devaluation, we don't have anything substantiated, and we have – we've got an industrial site here that has roughly three other towers that are approximately 1,000 feet plus in height, including TV-6, Channel 24 and Channel 4, in maybe a three- or four-block radius of this property, of this proposed site, and we – As far as that, we've got one more tower going in an area where there are already a significant number of towers and where there is an expectation of the use of these towers in this neighborhood, an industrial area.

MR. PLEVA: Counsel, may I ask a question? One of the elements contained in the policy statement and the policy statement was rather generic and it was meant to be as a foundation for the passage of specific ordinances. I'm not familiar with what specific ordinances at this time have been passed or whether they have been published as yet, but –

[20] MR. TANGEN: It's going to take effect in November.

MR. PLEVA: Well, okay. But – You state as a defense or as a justification that there are three other towers, did you say, in the immediate area?

MR. ZIMMERMAN: That is correct.

MR. PLEVA: And that's of course one of the things which the City and other jurisdictions around the country are attempting to guard against and that is tower farms. So specifically, you know, one tower may not be so bad, three of them is bad and four of them is worse. But the question I specifically would like to ask you, in view of the fact that these three other towers exist, what attempts has your client made to consolidation of your antenna on one of those existing towers?

MR. ZIMMERMAN: That issue has been – I'll let him address that issue because those communications I believe have been attempted with these different towers, and he can explain the basis for having to purchase the site based on those attempts.

That is correct. I am stating – addressing the safety issues and – with the other

* * *

[22] interrupt. I have a – Thank you.

Sir, continue.

MR. KINLOW: I talked to Mr. Ingram (phonetic) at MATC, and they didn't have their plan together. The FCC was getting ready to bring a freeze, which the freeze is on now, on any major move. You could not

move. So my counselor, Fischer & Waland (phonetic), told me to file my application and told me to find some land. I found some land, and I went to the City before I even made any attempt to purchase the land. I went to the planning department, and I was told that I had to get into an industrial area, which I went into an industrial area, and I found a spot. And I went back to the city planning and told them where I was going. I asked them were there any objections.

I was given the wrong information I guess somewhat because they told me I had to be 200-and-some feet away from residential. But I asked them about the building on the side. There was no indication of any kind. They said everything was okay. I made it specifically clear that I was going to have to spend a lot of money and I had to go before the FCC because I was trying to get a waiver, and if I get the spot, I would have to be [23] able to put the tower up and put the – move it into Milwaukee because if I – I could not make any changes after the freeze came on.

So I first went to the FAA, filed my application with the FAA. They approved it, put out a 30-day objection just like whoever objected to it, and they approved it. I don't know if they got any objections or not, but they approved it.

Then I filled out my application in 1995 to the FCC, and they approved it on September 17th, 1996. And then I had an option on the land for one year. I paid penalty on the land because I had to hold it until then until I get approval with the FCC in order to put the tower up. So after that was approved, then I paid for the land.

MR. PLEVA: Well, if you did all these things without having the special use permit, those are –

MR. KINLOW: Excuse me, I didn't know I had to have a special permit.

MR. PLEVA: – those are to some extent self-created hardships, but let me ask you this. Are you aware of the fact that Channel 58 was granted permission to build a tower but with the condition that it had to be build to specifications

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Supreme Court, U.S.
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JUL 12 2001
CLERK

No. 00-1849

In The

Supreme Court of the United States

JOEL J. KINLOW and TV-49, INCORPORATED,

Petitioners,

v.

CITY OF MILWAUKEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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27 pp

TABLE OF CONTENTS

Page

SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 1

SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION..... 1

42 U.S.C. § 1981..... 1

42 U.S.C. § 1983..... 2

STATEMENT OF THE CASE..... 3

REASONS FOR DENYING THE WRIT 16

I. THE PETITIONERS HAVE NOT SHOWN THAT THE LOWER COURT'S RULING ON THEIR DUE PROCESS CLAIM CONFLICTS WITH ANY PERTINENT DECISION OF THIS COURT..... 16

II. THE PETITIONERS HAVE NOT SHOWN THAT THE LOWER COURTS' RULING ON THEIR EQUAL PROTECTION CLAIM CONFLICTS WITH ANY PERTINENT DECISION OF THIS COURT..... 18

III. THE PETITIONERS HAVE NOT SHOWN THAT THE LOWER COURT'S DECISION ABOUT SUMMARY JUDGMENT RAISES AN IMPORTANT QUESTION INVOLVING THE SEVENTH AMENDMENT..... 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 18, 19

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 21

Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 19

Fidelity & Deposit Co. of Maryland v. United States of America, Through the Use of Lewis E. Smoot, 187 U.S. 315 (1902) 22

Lake Bluff Housing Partners v. City of South Milwaukee, 197 Wis. 2d 157, 540 N.W.2d 189 (1995) 17

Lake Bluff Housing Partners v. City of South Milwaukee, 222 Wis. 2d 222, 588 N.W.2d 45 (Ct. App. 1998) 17

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 17

Parkland Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979) 22

Plyler v. Doe, 457 U.S. 202 (1982)..... 19

STATUTES

42 U.S.C. § 1981..... 1, 2, 19

42 U.S.C. § 1983.....2, 3

Wis. Stats. § 62.23(7)(e)(10)..... 13

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Milwaukee Code of Ordinances, 295-19-8-a 4, 9, 10, 18

Federal Rules of Civil Procedure, Rule 56 22

Federal Rules of Civil Procedure, Rule 56(c) 20, 21

United States Constitution, Amend. VII 1, 21, 22

United States Constitution, Amend. XIV, § 1 1

SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV § 1.

42 U.S.C. § 1981

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like

punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined.

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment.

The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the

District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

The factual statement supplied by Mr. Kinlow and TV-49 in their Statement of the Case is incomplete. The following is, therefore, provided as a complete statement of all pertinent facts.

In their action, Mr. Kinlow and TV-49 have compared their treatment by the City of Milwaukee to its treatment of other television stations, including Channels 24, 10/36, 58 and 12. The City details below its actions with respect to these other broadcasters and TV-49.

Channel 24

On about December 27, 1974, B & F Broadcasting, Inc., applied for a building permit from the City of Milwaukee for the construction of the Channel 24 television transmission tower at 505 East Capitol Drive, Milwaukee, Wisconsin. Although the December 27, 1974 application refers to certain drawings for the tower, the Department does not maintain records of those drawings.

The December 27, 1974 application includes a subsequently-entered notation referring to a February 21, 1975 letter concerning another tower located at 5431 West Center Street, Milwaukee, Wisconsin. That letter discusses state regulation of the location of antenna systems in relation to streets and public thoroughfares, and not to

existing buildings. The December 27, 1974 application indicates that the related plans were checked on January 17 and January 26, 1975.

By a January 22, 1975 letter, the city plan examiner indicated to the building permit applicant that the proposed tower did not comply with a city ordinance requirement of certain safety devices for persons who would be inspecting the tower. In a February 20, 1975 decision, the City of Milwaukee Standards and Appeals Commission granted a variance to the building code, exempting the applicant from the city safety requirement on condition that the applicant took certain other safety precautions.

By an October 16, 1978 correspondence and Permit Application, B & F Broadcasting, Inc. sought to renew the previous application of December, 1974 to construct the Channel 24 tower; the earlier permit having expired before construction had commenced. The field notes of the building inspector relating to the construction of the Channel 24 tower indicate that the tower's construction was completed on or before September 10, 1979.

Suzanne Hanson was personally involved in the determination that the TV-49 building permit application for a transmission tower did not comply with the then-existing distance requirement of Section 295-19-8-a of the Milwaukee Code of Ordinances. To the best of her knowledge, none of the individuals employed by the City of Milwaukee in 1974 to 1975, and involved in the building permit application process for the Channel 24 tower, were involved in the determination that the TV-49 tower did not comply with Section 295-15-8-a of the Milwaukee Code of Ordinances.

Channel 58

Some twenty years after the process involving Channel 24, Weigel Broadcasting Company in June, 1995 filed a Notice of Appeal and Application for Review with the Board of Zoning Appeals for the City of Milwaukee seeking to place a broadcasting tower, transmitter building, and related facilities at 5215 North Menomonee River Parkway. The Board of Zoning Appeals of the City of Milwaukee conducted a hearing on the merits of the Weigel Broadcasting Company appeal on June 20, 1996.

Weigel Broadcasting Company ("Weigel") was requesting permission to construct a 1,227-foot transmitter tower on Milwaukee County-owned land which required a special use permit rather than a variance. The Board of Zoning Appeals was informed that the Weigel tower had the capacity to hold up to three television antennae owned by Weigel and up to ten antennae owned by Milwaukee County and the capacity for at least three additional full-power antennae from other broadcasters. The Board of Zoning Appeals was also told that Weigel would broadcast on three separate television stations which it owned from this new tower: 1) Channel 58, a local CBS affiliate, 2) Channel 46, "the only full-time Spanish station serving the Milwaukee community," and 3) Channel 65 which was described as providing "financial programming seven hours per day during the week and a variety of non-English programs with over a dozen different languages as well as religious and social programming directed at predominantly African-American congregations."

The Board of Zoning Appeals was further informed that prior to the hearing Weigel had "attempted to rent space on existing towers, contact[ing] every other tower owner in the community [and] no tower owner was willing to make space available." The Board of Zoning Appeals was also provided with expert analysis indicating that potentially harmful ice falling from this tower was not likely to travel more than several hundred feet from its base and that it was ideally located in a parkway in an urban area "so as to minimize the potential for property damage or personal injury."

Subsequent to the hearing on June 20, 1996, the Board of Zoning Appeals of the City of Milwaukee issued a written decision addressing Weigel's request for a special use permit and variance. In granting the requested special use permit and variance, the Board of Zoning Appeals subjected Weigel to certain conditions, including that Weigel "make the tower available for the attachment of at least three (3) additional full power television broadcasting antennae."

Transmission Tower Policy Statement

On March 21, 1997, the Common Council of the City of Milwaukee passed a resolution entitled "Substitute resolution approving a 'Transmission Tower Policy Statement' as part of the comprehensive plan of the City of Milwaukee." (City of Milwaukee, Office of the City Clerk, Certified Copy of Resolution, File No. 961537, pp. 1-4). In passing this resolution, the City of Milwaukee Common Council explained the need for such a step in part by

stating that, "[t]he current rapid proliferation of transmission towers, particularly those used for cellular telephone services and personal communications systems, makes it imperative that the City adopt a policy regarding the placement of such towers which protects Milwaukee residents and neighborhoods without imposing unreasonable burdens on the owners, operators and users of such facilities. . . . " *Id.*, p. 1. In adopting this resolution, the Common Council further explained its intention as follows: "A formally adopted policy on the placement of transmission towers can serve as a reference tool and guide for the Board of Zoning Appeals, the City Plan Commission, City Building and Zoning staff, and other City bodies and officials responsible for making decisions about the placement of transmission towers in the City of Milwaukee. . . . " *Id.*

Within the statement of the policy itself, the Common Council explained that:

> Transmission towers generally come in two varieties – those that support TV and radio reception/transmission systems ("RTS"), and those that support personal communications systems, cellular communications facilities, personal wireless services and similar facilities ("PWS"). The former are usually very tall (often over 1,000 feet in height) and relatively few in number. The latter are relatively short (100-200 feet in height) but are becoming quite numerous. The policy statements apply to either or both tower types as noted.

Id., pp. 2-3. With respect to both RTS towers and PWS towers, the Transmission Tower Policy Statement further provided as follows:

> As advances in technology render it feasible to improve overall communications while reducing the total number of transmission towers, it is the policy of the City to strongly encourage the design of such towers to accommodate multiple users in order not only to reduce the proliferation of such towers, but also to secure a reduction in the total number of towers. To the extent that transmission towers can hold multiple reception/transmission ("R/T") systems, tower proponents should be strongly encouraged to make every effort to locate their R/T systems on existing structures. *Applicants for new transmission towers should be encouraged to design such facilities to accommodate Multiple R/T systems and associated equipment in order to fulfill the City's policy of reducing the total number of towers over time.* At a minimum, RTS towers for TV and/or radio facilities should be designed to support at least three R/T systems having similar power.

Id., p. 3 (emphasis supplied). The City's Transmission Tower Policy Statement of March 21, 1997 further provides the following as to RTS towers:

> Accomplishment of the policy objective providing for coordinated usage of transmission towers should lead to a reduction in the total number of such towers within the City through consolidation. It is the policy of the City to strongly encourage such consolidation in order not only to reduce potential proliferation of transmission towers, but also to secure a net reduction in the total number of transmission towers. . . . Applicants for the approval of new towers who are able to demonstrate that the construction of such new towers will eventually result in the removal of one or more existing

> towers should be presumably deemed to have demonstrated that such towers will indeed fulfill the policy objective providing for consolidation of transmission towers.

Id. at pp. 3-4.

Channel 49

On or about May 19, 1997, the plaintiff, Joel J. Kinlow, filed a Notice of Appeal and Application for Review with the Board of Zoning Appeals for the City of Milwaukee relating to property located at 4872 North Fratney Street. He indicated that the property at that time was not in use and he proposed to place a tower on that site.

On May 16, 1997, Attorney Milton G. Emmerson, on behalf of Joel J. Kinlow, wrote the Board of Zoning Appeals requesting a variance for the previously-mentioned property so that Mr. Kinlow's television station could "erect a transmitter tower on the subject property to enhance the reception of channel 49." As reflected in that correspondence, the then-applicable section of the Milwaukee Code of Ordinances provided that, " '[n]o structure other than related accessory structures shall be located within a circle having the transmitter tower as its center and a radius equal to 20% of the height of the tower or 100 feet whichever is greater.' " *Id.*, quoting sec. 295-19-8-a, Milwaukee Code of Ordinances ("MCO").

Mr. Kinlow proposed constructing a 1,053-foot tall transmitter tower at the subject property. At the time of the application, Mr. Kinlow's television station had a "transmitter tower . . . located in Oak Creek, Wisconsin."

On June 5, 1997, a zoning specialist of the Department of Building Inspection of the City of Milwaukee wrote to Mr. Kinlow, advising him that "the distance between the proposed tower and the existing buildings does not meet the dimensions that are required by the Zoning Code" and that he would first have to "obtain a variance to proceed with [his] project." In referring to the applicable Zoning Code section, that is, sec. 295-19-8-a, the zoning specialist advised Mr. Kinlow that, "there appears to be 4 buildings located within 210.6 feet of the proposed tower [that is, within 20% of the height of the tower]" and that "one building is located within 4.66 feet of this tower."

Although Mr. Kinlow's counsel represented in his submission to the Board of Zoning Appeals that "Mr. Kinlow has been told by owners of the adjoining properties that they do not object to locating a transmitter tower at the proposed site," the Board of Zoning Appeals received an affidavit objecting to the requested variance from an individual who represented that he was the owner of a property "less tha[n] 100' away from" Mr. Kinlow's property, that this nearby property owner had been at that location "for more than thirty (30) years," that he objected to the tower for various reasons, and that he had not been contacted by Mr. Kinlow before notice of the hearing before the Board of Zoning Appeals had been issued.

The Board of Zoning Appeals also received a facsimile transmission from a property owner whose land "abuts the [subject] property on the east border" and who objected to the requested variance for various reasons,

including safety and health reasons related to the objector's tenants at his property

The Board of Zoning Appeals conducted a hearing on Mr. Kinlow's variance request on July 31, 1997. A representative of the Department of City Development appeared at the hearing to object to Mr. Kinlow's request for a variance for several reasons including: 1) That Mr. Kinlow's request was contrary to the City's previously-passed tower policy statement in that Mr. Kinlow's station's antennae could have been placed on another already-existing tower; and, 2) that the proposed tower would only be 151 feet away from an apartment and other residences and perhaps a shorter distance than that away from a Pick-N-Save supermarket with many pedestrians and that ice could fall from the tower.

Counsel for Mr. Kinlow at the hearing before the Board of Zoning Appeals contended that the variance should be granted in part because Mr. Kinlow had suffered a hardship in this matter as he had already paid more than $200,000 to purchase the subject property and had been told by a representative of the City prior to that purchase that he would not need any variance from applicable distance requirements. Counsel for Mr. Kinlow 1) admitted that he could not represent to the Board of Zoning Appeals that the offer to purchase contained any type of contingency relating to variances or special use permits, 2) did not contest that such a contingency had either been waived or never been included because the purchase had gone forward before a building permit had been issued, 3) admitted that there was no written communication from anyone on behalf of the City confirming that no variance or special use exemption would be

required, and 4) conceded that Mr. Kinlow had apparently proceeded only on the word of this City employee.

When asked about the City's Transmission Tower Policy Statement at the hearing before the Board of Zoning Appeals, Mr. Kinlow indicated that he had attempted to mount his antennae on other already-existing antennas, and had not been able to do so at Channels 12, 6 or 4, that MATC did not have their plan together for their multi-user tower at a time during which the FCC would allow Mr. Kinlow to move his tower, and that Channel 58's multi-user tower was also not an option at the time of Kinlow's FCC application because it did not exist, although it did exist at the time of Kinlow's Board of Zoning Appeals hearing. At no time during his presentation, did Mr. Kinlow ever indicate that his proposed transmission tower could or would provide facilities for anything more than one television station.

In deliberating on the matter, the Chairman of the Board of Zoning Appeals indicated that he had concluded that Mr. Kinlow's application was inconsistent with the City's Transmission Tower Policy Statement and that Mr. Kinlow had not met any of the ordinance criteria for the grant of a variance. One other Board member in moving to deny the variance indicated that while Mr. Kinlow might have met one of the criteria, he had not, as required, met all of the criteria. The Board then voted unanimously to deny the variance request.

The Board of Zoning Appeals issued its decision denying the requested variance on August 13, 1997. Following the decision of the Board of Zoning Appeals, the plaintiff, Joel J. Kinlow, pursuant to Wis. Stats.

§ 62.23(7)(e)(10), sought judicial review of the decision of the Board of Zoning Appeals with a summons and complaint filed in the Milwaukee County Circuit Court in an action against the Board of Zoning Appeals. On December 23, 1998, Milwaukee County Circuit Court Judge Victor Manian issued a decision in the aforementioned lawsuit affirming the decision of the Board of Zoning Appeals of the City of Milwaukee.

Channels 10/36

On November 20, 1997, the Board of Zoning Appeals of the City of Milwaukee conducted a hearing into a request by the Milwaukee Area Technical and Adult Education District for a special use permit to construct a 1,221 foot high transmitter tower at 4350 North Humboldt Avenue. Prior to the hearing before the Board of Zoning Appeals, the City Plan Commission had "determined that the proposed use would not have an adverse impact provided [that MATC] continues to aggressively market the tower for multiple antennae usage [and that] the tower is built with a capacity for nine stations. . . . " A representative of the City of Milwaukee indicated at the Board of Zoning Appeals hearing relating to the MATC tower that MATC's tower had the capacity for up to 100 stations, including 14 FM signals and further indicated that the City felt that MATC met the intent of the City's transmission tower policy.

MATC presented technical testimony to the Board of Zoning Appeals indicating that its tower would permit a number of broadcasters all to be "top-mounted" and

would provide the necessary television transmission service without distortion or loss of signal for a number of broadcasters. The Board of Zoning Appeals received technical testimony indicating that the MATC tower would have a "star mount" on the top of the antenna allowing for mounting of up to nine antennas on the top, rather than on the side of the structure.

The Board of Zoning Appeals was provided with testimony that MATC already had arrangements for one radio station to be mounted on their tower and that other television stations would in the near future also enter into agreements with them for mounting on the tower.

At the conclusion of the hearing, the members of the Board of Zoning Appeals voted to approve MATC's request, explaining in part that their decision was based upon MATC's ability to mount a number of users on its tower.

Channel 12

On or about July 31, 1997, the WISN division of the Hearst Corporation filed a Notice of Appeal and Application for Review with the Board of Zoning Appeals of the City of Milwaukee to construct a 116 foot extension to the height of an existing television transmitter tower located at 5215 Milwaukee River Parkway. A diagram of the tower with the extension indicates that the extension provided only an insignificant modification to an already existing television transmission tower. The WISN tower is located quite close to the tower constructed by Weigel.

On or about October 16, 1997, and in a revised correspondence dated January 6, 1998, the Department of Building Inspection of the City of Milwaukee advised WISN that the proposed 116 foot addition to the existing 1,103 foot transmitter would require the grant of a special use permit. The WISN tower is located generally in an area within or adjacent to Lincoln Park.

In a second revised plan of operation presented to the Board of Zoning Appeals, WISN indicated that it was seeking only to add 115 rather than 116 feet to its existing tower and that it was seeking this addition to "broadcast the best DTV signal to the largest audience. . . . " The WISN tower was initially constructed in 1954-5 and, while located in a two-family residential district, the City of Milwaukee then permitted such a use in residential districts.

The Board of Zoning Appeals was provided with various expert analyses indicating that the television transmission service sought by WISN could be provided either by the MATC tower or the Weigel tower. The Board of Zoning Appeals received a petition indicating that a large number of area residents supported the extension of the Channel 12 tower.

Following a Board of Zoning Appeals hearing on WISN's request on July 29, 1999, the Board of Zoning Appeals issued a decision dated August 27, 1999 denying the request for the 115 foot addition to the existing transmitter tower. In reaching its conclusion, the Board of Zoning Appeals stated in part:

> The testimony and the record fail to demonstrate that the proposed DTV antenna could not

> reasonably be located at a different location and still meet the public convenience. There was no evidence provided that the applicant made any effort to acknowledge or conform to the City's goal and purposes in adopting the Tower Policy. There was no evidence presented to show that the applicant made any effort to attempt to consolidate its antenna on another tower or that applicant's proposed tower extension furthers the Tower Policy objective of coordinated usage.

WISN has filed an appeal of the Board of Zoning Appeals' decision in the Circuit Court for Milwaukee County.

REASONS FOR DENYING THE WRIT

I. THE PETITIONERS HAVE NOT SHOWN THAT THE LOWER COURT'S RULING ON THEIR DUE PROCESS CLAIM CONFLICTS WITH ANY PERTINENT DECISION OF THIS COURT

In stating their case for granting the writ as to their due process claim, the petitioners have not demonstrated that the decision of the Seventh Circuit Court of Appeals conflicts in any way with the decision of another United States Court of Appeals or any State court of last resort or has greatly departed from the accepted or usual course of judicial proceedings. Petitioners have also not argued that the decision of the Seventh Circuit Court of Appeals has decided any issue with respect to their due process claim that has not previously been settled by this court. To the extent that they have attempted to state any case for the grant of this portion of their petition, they appear

to be contending that the lower courts erred in granting summary judgment on their due process claim because the lower courts ignored a property interest possessed by petitioners. That contention is fatally flawed because the petitioners, as a matter of law, had no property right under Wisconsin law.

As the petitioners themselves acknowledge, this Court recently reaffirmed in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) that, "[t]he hallmark of property, the Court emphasized, is an individual entitlement *grounded in state law* which cannot be removed except 'for cause' " (emphasis supplied) (citations omitted). The petitioners are attempting to stretch one city plan examiner's statements about the proposed site for the tower into some type of property right under Wisconsin law. Their contention, however, simply does not comport with that law.

Under the law of Wisconsin, " 'a building permit grants no rights to an unlawful use.' " *Lake Bluff Housing Partners v. City of South Milwaukee*, 222 Wis. 2d 222, 227, 588 N.W.2d 45 (Ct. App. 1998), quoting *Lake Bluff Housing Partners v. City of South Milwaukee*, 197 Wis. 2d 157, 180, 540 N.W.2d 189 (1995). "[I]t is settled in Wisconsin that construction in violation of a zoning classification is unlawful – even when construction is authorized by a building permit issued voluntarily by the appropriate authorities." *Lake Bluff*, 222 Wis. 2d at 228.

The plan examiner, did not, ultimately, provide any building permit to the petitioners. Even if he had done that, however, the petitioners would not have had any property right under Wisconsin law to construct the proposed television tower at the site that they had selected

because it would have been illegal, given the requirements of sec. 295-19-8-a of the Milwaukee Code of Ordinances.

The district court concluded that the petitioners "have made no showing that they had a property right to this permit under Wisconsin law." App. 20. The lower courts correctly concluded, consistent with this Court's rulings, that summary judgment should be granted as to the petitioners' due process claim.

II. THE PETITIONERS HAVE NOT SHOWN THAT THE LOWER COURTS' RULING ON THEIR EQUAL PROTECTION CLAIM CONFLICTS WITH ANY PERTINENT DECISION OF THIS COURT

Once again with regard to any claim for a violation of their equal protection rights, the petitioners can only be contending that the lower courts erred with respect to summary judgment because their decisions conflict with a relevant decision of this Court. They have again utterly failed to make out their contention on this point.

With respect to this claim, the petitioners cite to *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) without any argument or explanation whatsoever. Petition, p. 9. This Court's decision in *Arlington Heights* does not, alone, demonstrate that the lower courts in this matter reached any decision on the petitioners' equal protection claim that conflicted with the pertinent decision of this Court.

The lower courts concluded that the petitioners could not, as a matter of law, maintain an equal protection claim because they had adduced no evidence whatsoever that

similarly situated members of an unprotected class had been treated more favorably than had the petitioners. App. pp. 9-12, 23, n.2 (discussing that claim within the context of the petitioners' assertions under 42 U.S.C. § 1981). This Court's decision in *Arlington Heights* does not address the issue that was viewed by the lower courts as the lynchpin for their analysis.

This Court has, on other occasions, made clear that, "[t]he Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982). As noted by the court of appeals below, the petitioners cannot show that television station operators who may have been in the unprotected class were treated more favorably. App. pp. 9-11. These other television station operators either obtained the permission to build their towers before passage of the Transmission Tower policy Statement (Channels 58 and 24), or agreed to build a tower that complied with that Statement (Channels 10-36), or sought approval from entirely different decision-makers employed decades-apart by the City (Channel 24). App. pp. 9-11. In accord with the directions of this Court, the lower courts evaluated and correctly concluded that the petitioners could not establish that any of the other broadcasters who received permits [and were thus more favorably treated] were actually similarly situated.

Petitioners attempt to make much of the inadvertent reference by the court of appeals at one place to the Transmission Tower Policy Statement as an "ordinance."

Petition, p. 6 and App. p. 5. The error, however unfortunate, is irrelevant to the analysis of the merits of the Petition and immaterial to the outcome reached by the appeals court below. The opinion of the court of appeals correctly reflects that it understood that the Statement, though not binding on the Board of Zoning Appeals, was nonetheless intended to direct its deliberations and properly did so. App. pp. 5 ("the 'Transmission Tower Policy Statement' provides that the 'policy on the placement of transmission towers can serve as a reference tool and guide for the Board of Zoning Appeals . . . for making decisions about the placement of transmission towers in the City of Milwaukee' ") and 7 ("the Board concluded that Mr. Kinlow's proposed tower did not comply with the 'Tower Policy Statement' "). The court of appeals also correctly understood that while the Transmission Tower Policy Statement was not binding on the Board, its existence as a " 'reference tool and guide for the Board of Zoning Appeals' " served to distinguish petitioners' request for a building permit substantively from the request of other transmission tower owners whose requests either preceded the statement or complied with it or the subsequent ordinance. App. p. 5.

The lower courts' decisions are consistent with the rules of civil procedure and this Court's interpretation and application of them with respect to summary judgment motions. Fed.R.Civ.P. 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

law." As this Court has explained, "[i]n our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In the present action, the lower courts correctly followed the dictates of the civil procedure rule and this Court's decision in concluding that the petitioners had failed to make a sufficient showing with respect to the issue of more favorable treatment of similarly situated members of an unprotected class. There simply is no basis, therefore, for granting the requested writ with respect to petitioners' equal protection claim.

III. THE PETITIONERS HAVE NOT SHOWN THAT THE LOWER COURTS' DECISION ABOUT SUMMARY JUDGMENT RAISES AN IMPORTANT QUESTION INVOLVING THE SEVENTH AMENDMENT

While the petitioners have contended that granting summary judgment to the City in this case has violated their right to a jury trial under the Seventh Amendment, they have not described in any fashion the precise manner in which the grant of summary judgment violated that right. This Court has long ago established that the proper application of summary judgment procedures does not violate a losing party's Seventh Amendment right to a jury trial. No showing has been made that the application in this case with respect to the single issue of the dissimilarity of permitees in the unprotected class

raises in any fashion an important constitutional question involving the Seventh Amendment.

While the petitioners have provided an extensive discussion of the policy standards for granting summary judgment under Rule 56 and the potential for conflict between its application and the rights protected by the Seventh Amendment, they have done nothing to show that any particular conflict has occurred in this case. As is clear from the preceding discussion in this Reply, the sole issue resolved on summary judgment below was the question of whether any of the successful permit applicants in the unprotected class were, in fact, similarly situated to the petitioners. Ample evidence was presented below establishing that the successful applicants were not similarly situated. The petitioners provided no evidence whatsoever establishing that the other applicants were, in fact, similarly situated, with the exception of Channel 24, which received its permit from entirely different decision-makers. There was simply no competing evidence through which a jury should sift in order to make a determination about this issue. The petitioners have failed to demonstrate that the potential for conflict between the Seventh Amendment and the summary judgment rule in fact did occur in this case, much less, that this Court needs to address that potential conflict here.

This Court long ago established that the proper application of summary judgment procedures does not result in the violation of the Seventh Amendment right of the losing party. *Fidelity & Deposit Co. of Maryland v. United States of America Through the Use of Lewis E. Smoot*, 187 U.S. 315, 319-20 (1902). *See also Parkland Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 (1979). There has been

nothing in this case but the proper application of summary judgment to the issue presented to the lower courts.

CONCLUSION

For the foregoing reasons, the Petition for Writ of *Certiorari* should be denied.

Dated this 12th day of July, 2001.

Respectfully submitted

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